184

Supreme Court, U.S.
FILED

No. ①

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In The
Supreme Court of the United States

POLINA GERTSKIS,

Petitioner,

v.

CITY OF NEW YORK DEPARTMENT OF HEALTH & MENTAL HYGIENE, COMMISSIONER THOMAS FARLEY; ROSE TESSLER; PETER BACKMAN; AMERICAN FEDERATION OF STATE COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO, DISTRICT COUNCIL 37 ("DC37) & LOCAL 375, CIVIL SERVICE TECHNICAL GUILD ("LOCAL 375"),

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether Governmental employer and Union could deny tenured Civil Servant a pre-termination Due process § 75 hearing, discriminatory remove petitioner from her job for 4 years, then retaliatory terminate petitioner for the absence created by the discriminatory due process depravation and deny petitioner interest in "property" and "liberty" without due process of law.

2) Whether the Federal Courts abused its discretion by denying review of a Federal Constitution question.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review opinion and judgment of the U.S. Court of Appeals for the Second Circuit below and The City Of New York Office Of Administrative Trials And Hearing report and recommendation.

OPINIONS BELOW

United States Court Of Appeals For The Second Circuit Opinion docket # 10-3958 dated March 1, 2011 unpublished. It reprinted at Appendix (App. 1)

The opinion of the United States court of appeals docket # 09-2458- cv 2235 October 25, 2010 unpublished. Its rulings are reprinted in the App. 3

The opinion of the United States court of appeals docket # 09-2458- cv 2235 dated April 30, 2010 unpublished. Its rulings are reprinted in the App. 8

The Judgment dated March 24, 2009 and opinion of the United States district court docket # 07 cv 2235 dated March 26, 2009 unpublished. Its rulings are reprinted in the App.13

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Report and Recommendation of The City Of New York Office Of Administrative Trials And Hearing index No 10-1938 dated 07/30/10 reprinted in App.76

JURISDICTION

The Second Circuit Court of Appeals filed its decision on April 30, 2010 and entered an order denying petitioner's timely motion for rehearing on October 25, 2010. A copy of the order denying rehearing appears at Appendix 3(App.3). The Application No. 10A696 for an extension of time to and including March 24, 2011 was granted by Justice Ginsburg on 01/14/2011. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari

OTHER JURISDICTION

United States Constitution Article III Section 2.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.

This Court has jurisdiction under United States Constitution Article III Section 2 to review the Report and Recommendation of The City Of New York Office Of Administrative Trials And Hearing index No 10-1938 dated 07/30/10 on the writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress.

42 U.S.C. § 1981(a)

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e- 2 (1)

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex.

42 U.S.C. 2000e-3(a)

Title VII makes it an "unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge * * * under [Title VII]."

N.Y.CSL CIV S § 75.1(a)

Removal and other disciplinary action. A person described in paragraph (a) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service.

N.Y.CLS Labor § 623(1)(2*iv)(2010)*

A decision of a referee, if not appealed from, shall be final on all questions of fact and law, when alleged that a claimant was denied constitutional rights in connection with the administrative processing, hearing.

STATEMENT OF THE CASE

INTRODUCTION

On 03/15/07, petitioner, United States citizen, tenured Civil Service employee filed complaint alleging employment discrimination including quid pro quo/ hostile environment sexual harassment by top authority manager.

Petitioner's complaint culminated in her constructive discharge, wrongful termination in retaliation of complaining with constitutional depravations.

THE RECORD BELOW

Preponderance of evidence after discovery showed that top authority manager-director of the D.O.H.M.H. Bureau of Laboratories/Deputy Assistant Commissioner Peter Backman aided for years sex discrimination against petitioner, based on quid- pro quo, hostile environment. He was solely responsible for leading harassment and discrimination of supervisors and coworkers.

He used petitioner's rejection of his advances as the basis for a decision affecting petitioner's compensation, terms, conditions and privileges of her job and used his authority to further the harassment and discrimination and "altered the conditions of employment by creating a hostile work environment through sexual harassment. Events at issue began in 1994, when Backman and Union refused to process petitioner's civil service title that automatically matures after 1 year of service. Backman asked petitioner to come to him on a daily basis to remind him about the problem, until a private attorney resolved it.

Preponderance of compelling evidence attested that: petitioner was repeatedly denied promotions and interviews except one interview in 13 years of employment. On that 12/08/04 interview, Backman personally promised to be petitioner's "judge". But without petitioner's response to his sexual advances he denied a promotion (despite petitioner's stellar working record with MS in chemistry, over 20 years of experience, outstanding evaluations and recommendations from technical supervisors to promote). Less qualified male – was promoted over the petitioner, displaying a preference for someone outside the protected class.

Respondent's own contentions in petitioner's 11/09/05 Arbitrators Award demonstrated that they proffered reasons for not promoting was a pretext and false and the real reason was discrimination: " City concedes that the Grievant is a valued employee who performs her duties with great proficiency"; "Further, it is clear that the Grievant is an outstanding employee who is a valued member of the laboratory staff. Based on her skill and the quality of her work, she requires very little supervision."

Petitioner was forced to work out of title from 1994 – 2006 performing higher paid duties but compensated at the beginner level salary.

In 2003 grievance, petitioner requested proper compensation for her duties. Grievance was denied, based on the fact that public records were falsified under Backman's directions and petitioner's name was removed from her 2003-2004 unsupervised assignments. In addition starting from 02/05 petitioner was constructively demoted by adding an additional supervisor. This supervisor was petitioner's coworker of 12 years. This act was sufficient to erase Union's assertion of work out of title.

Backman, on his own knowledge of the falsification, initiated visit to petitioner on 07/21/05 (letter documenting it was submitted to Court) to inquire petitioner's opinion of who had falsified public records and removed her name from her assignments and why. It was an altering event, which uncovered to petitioner Backman's intentions very clearly. The intentions were that petitioner would not get anything until she would submit to his demands, which he implicitly showed on his face. On 09/22/05, Backman agreed that it is up to him what the outcome of the arbitration would be.

Approximately one week later, during a subsequent visit to the petitioner, Backman pleaded with and tried to kiss the petitioner. Backman warned petitioner on 10/05 that it is in her best interest not to have the falsified documents checked by an expert, since it would lead her to become a "victim."

The last 3 months of petitioner's employment were unbearable. She was isolated from others and constantly harassed, ridiculed, insulted and intimidated by supervisors with false letters and e-mails with the requests to reprimand her. Backman was collecting files on her and stalking her daily. She could not tolerate it anymore, therefore, requested leave without pay. Backman "lobbied" for petitioner's unpaid leave of absence, knowing she will not return.

Respondents approved one-year leave of absence for petitioner on 07/01/06, but then refused to change petitioner's reason for leave because of sexual harassment or provide any relief.

Facts corroborated by direct compelling admissible in Court evidence attest that petitioner's former employer's EEO director and union knew of the harassment and discrimination from five official EEO complaints (2003-2006) and 8 EEOC complaints (2007-2010) – 2 of which were sent to the Department of Justice.

Employer and Union refused to provide any relief, condoned discriminatory and harassing behavior of the top authority manager, intentionally allowed discrimination to continue for years, until petitioner's constructive discharge in 2006 and also denied transfer.

EEO director refused to investigate petitioner's complaints. Numbering of "Investigative reports" in respondents motion for summary judgment did not correlate to the initially disclosed EEO files. Reports were absent altogether from the EEO original file. Also missing were all sexual harassment documents submitted on 11/08/06 appointment.

Petitioner's last internal 11/08/06 sexual harassment complaint led to the open hostility from internal EEO director, who denied interviewing and literally ejected petitioner by force from the office and denied any future appointments to review the complaint. EEO director stated on 02/13/08 deposition that it was not her responsibility to investigate petitioner's 08/04/05 quid- pro quo/ retaliation complaint (which lacked any "investigative report") and suggested to present petitioner's complaint to the harasser. She stated, " It is up to you to determine who would be the proper authority for complaining." Some of the examples of director of EEO investigation in document from 04/11/07 state " Respondents chorused, that Lab employees were not looking forward to PG(petitioner's) return, stating they have concerns of her behavior based on the manner she demonstrated her thoughts/ mentality."

Constructive discharge corroborated by the Unemployment Insurance Appeal Board decision ALJ Case No 007-06803 dated April 30, 2007. It's opinion stated:" The credible evidence established that since the claimant filed a grievance alleging that she was assigned out of title work she has been subjected to discriminatory and harassing behavior by the employer. I note that the claimant attempted to rectify these matters through her union but it was to no avail. I conclude under these circumstances, that she quit her job with the good cause under the law. Her employment ended under non-disqualifying conditions. Respondents did not appeal it. Document appears at App. 46.

Petitioner applied to more than 70 positions outside of the Bureau of Laboratories, to which she was fully qualified, but was not offered any position.

Petitioner was officially terminated on 08/10 for the absence without leave. Union failed to show up on any termination hearings. Petitioner was deprived of protected interest in "property" and "liberty", denied Due process of law and equal protections of the law.

Petitioner was warned before the hearing, that it is in her best interest to resign on her own, or be terminated after the hearing and face consequences of a "bad record" for future employers. Now petitioner's case is all over the internet, which resulted from loss of potential new and more intellectually and financially rewarding employment.

Damaging to petitioner information was placed on the internet on 09/01/10. Document appears at App. 109

UNEMPLOYMENT INSURANCE APPEAL BOARD PROCEEDINGS

State Of New York Unemployment Insurance Appeal Board opinion A.L.J. Case No 007-06803 dated 04/30/07 appears at App. 46

DISTRICT AND SECOND CIRCUIT COURT'S PROCEEDINGS

Pertinent proceedings appears at App.1-38; App. 49-67.

THE CITY OF NEW YORK OFFICE OF ADMINISTRATIVE TRIALS AND HEARING PROCEEDINGS

Pertinent proceedings appears at App. 68-110.

REASONS FOR GRANTING THE PETITION

"[f]or at least a [half]-century, this Court has made clear that . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972).

1 REVIEW IS WARRANTED GIVEN THE LOWER COURTS DENIAL REVIEW OF FEDERAL CONSTITUTION DEPRAVATIONS AND RADICAL DEPARTURE FROM THIS COURT'S HOLDINGS AND THE GUARANTEES OF THE CONSTITUTION OF THE UNITED STATES.

Depravation of guaranteed constitutional right to a benefit is a question of federal constitutional law that has not been, but should be, settled by Court.

"For to grant any relief, the federal court would first have to determine that a violation had occurred, which would in turn require a finding of falsity. I recognize that there is authority for the view that falsity is an element of the violation". See Sims v. Fox, 505 F. 2d 857, 863-864 (CA5 1974) (en banc), cert. denied, 421 U.S. 1011. Cf. Paul v. Davis, 424 U.S. 693, 709-710 (describing *Board of Regents v. Roth, 408 U.S. 564*, as involving government "defamation").

Petitioner's complaint set forth claims under 42 U.S.C. 1983, alleging facts of depravation of interest in "property" and "liberty", denial of due process and equal protections of the law guaranteed by the Fourteenth Amendment Clause, which Court disregarded or found without merit in the opinions. Under 42 U.S.C. § 1983 Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress.

2 THE REFUSAL BY THE LOWER COURT'S TO REVIEW PETITIONER'S CLAIMS AND STRICTLY ADHERE TO THE FEDERAL STATE AND LOCAL LAWS AND LONG ESTABLISHED COURT RULES FOR DISCOVERY EVIDENCE

WAS PLAINLY ERRONEOUS AND CONTROVERSIAL TO THE FACT FINDING. IT ENDORSED PUBLIC OFFICIALS TO CONTINUE FEDERALLY PROHIBITED PRACTICES AND EFFECTIVELY NULLIFIED CONSTITUTIONAL GUARANTEES AND IMPORTANT PROVISIONS IN TITLE VII.

Since Courts summarily dismissed and foreclosed all petitioners' claims, it authorized respondents to officially terminate and reprise petitioner for exercising her rights.

The erroneous granting of summary judgment, particularly prejudicial to the rights of petitioner, led to impermissible denial of petitioner's basic human rights and resulted in irreparable damages, forcing petitioner to endure grievous financial loss and emotional pain, suffering and loss of a very essence of personal freedom for rightfully exercising her rights.

Relief sought is unavailable in any other court or through any other appellate process.

Under N.Y. C.P.L.R. 7804(f); the four-month statute of limitations began to run 30 days after the suspension without a hearing became effective, and the employee's demand for a hearing did not toll the statute of limitations. Matter of Rapoli v Village of Red Hook (2006, 2d Dept) 29 App Div 3d 1007, 815 NYS2d 722.

Petitioner's 09/30/10 Writ of Mandamus, invoked under § 1983, was an avenue for review of a nonfinal order where neither an appeal of right or an interlocutory appeal is available. Writ of Mandamus seeking declaratory and injunctive relief after wrongful action was taken and depravation was complete, raised federal constitution question and expressly stated: "This action involve a common question of law and fact with the pending before this Court petition for hearing EN Bank and rehearing. Consolidation of actions is required to fully redress wrong committed."

In Quinn ***613 F.2d 438; 1980*** Second Circuit court stated:"**The Supreme Court has suggested, on occasion, that state law is the sole vehicle for the creation of property rights, Bishop supra 426 U.S. at 344, 96 S. Ct. 2704, but it has, more recently, instructed that "federal constitutional law determines whether (an) interest rises to the level of a "legitimate claim of entitlement' protected by the Due Process Clause."** ***Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9, 98 S. Ct. 1554, 1560, 56 L. Ed. 2d 30 (1978)*****. See generally, Monaghan, Of "Liberty" and "Property," 62 Cornell L.Rev. [*448] 405, 434-44 (1977). Thus, although the primary source of property rights is state law, the state may not magically declare an interest to be [**22] "Non property" after the fact for** ***Fourteenth Amendment*** **purposes if, for**

example, a longstanding pattern of practice has established an individual's entitlement to a particular governmental benefit. See, e. g., *Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)*; *Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42-43, 64 S. Ct. 384, 88 L. Ed. 526 (1944)*."

3 REVIEW WILL PROVIDE NEEDED CLARITY AND GUIDANCE FOR PUBLIC OFFICIALS IN RESPECTING PROPER APPLICATION OF LAW AND THEIR OWN POLICIES.

Longstanding pattern of practice has established under Civil Service Law § 75, that tenured Civil Service employees have protected property interest in their continued employment and cannot be removed or subjected to any disciplinary penalty "except for incompetency or misconduct shown after hearing upon stated charges".

Petitioner's interest rises to the "legitimate claim of entitlement " and should have been protected under Due process clause.

Finding of fact in Unemployment Insurance Appeal Board 04/30/07 decision under **N.Y.CLS Labor §623(1)(*2iv)(2010)*** should have been final on all questions of fact and law, since petitioner alleged that she was denied constitutional rights in connection with the administrative processing, hearing.

Under pretense of a res-judicata, respondents acted with willful, wanton and reckless disregard of and indifference to petitioner's Constitutionally guaranteed rights.

No person can be deprived of a right in a manner which contravenes the due process provisions of the Fourteenth Amendment. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. Board of Regents v. Roth, 408 U.S. 564.

In *Codd v. Velger, 429 U.S. 624, 628, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977)* MR. JUSTICE STEVENS said: "This hearing must include consideration of whether the charge, if true, warrants discharge. The discharge itself is part of the deprivation of liberty against which the employee is entitled to defend." If the charge, whether true or false, involves a deprivation of liberty, due process must accompany the deprivation. And normally, as *Roth* plainly states, the Constitution mandates "a full prior hearing." *408 U.S., at 574.*

In 1985, the Supreme Court decided the seminal case of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). The Court in Loudermill held that a public employee with a constitutionally-protected right in continued public employment (i.e., he has a property interest and is no longer terminable at-will) may not be terminated without a hearing prior to his or her separation from employment.

4 REVIEW WILL SERVE THE PUBLIC INTEREST IN GIVING AN EFFICIENT AND COMPETENT MESSAGE THAT THIS COUNTRY IS STRIVING TO ELIMINATE THE DISCRIMINATION.

If proven at trial, petitioner's Constitutional depravation claims, quid pro quo/ hostile environment, constructive discharge and wrongful termination in retaliation of complaining claims would be a loss of tangible employment - actions courts have held to qualify under Title VII in other cases.

Second Circuit and district court's decisions offending most basic constitutional guarantees of the Bill of Rights and conflicting with the fundamental decisions of the United States Supreme Court holdings:
Board of Regents v. Roth, 408 U.S. 564;
Boddie v. Connecticut 401 U.S. 371, 377;
Perry v. Sindermann, 408 U. S. 593, 597 (1972).
Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985)
Parratt v. Taylor, 451 U.S. 527, 537, 101 S.Ct. 1908, 1913 (1981)

Carey v. Piphus, 435 U.S. 247, 259, 98 S.Ct. 1042 (1978);
and with decisions of the United States Supreme Court and Second Circuit Court precedent cases on petitioner's sex/ sexual harassment claims:
Harris v. Forklift Systems, Inc., 126 L. Ed. 2d 295 (1994);
Burlington Industries, v. Ellerth 524 U.S. 742
Meritor Sav. Bank. v. Vinson, 477 U.S. 57, 91 (1986)
Kotcher v. Rosa 957 F.2d 59 (1992);
Karibian v. Columbia University, 14 F.3d 773, 780-81(1994)
Carrero v. New York City Hous. Auth., 890 F.2d 569, 577(1989)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
Polina Gertskis
Petitioner Pro Se
1745 East 12 Street
Brooklyn, NY 11229
(718) 253-0692

March 18, 2011.

No. ________

In The Supreme Court of the United States

POLINA GERTSKIS,

Petitioner,

v.

CITY OF NEW YORK DEPARTMENT OF HEALTH & MENTAL HYGIENE, COMMISSIONER THOMAS FARLEY; ROSE TESSLER; PETER BACKMAN; AMERICAN FEDERATION OF STATE COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO, DISTRICT COUNCIL 37 ("DC37) & LOCAL 375, CIVIL SERVICE TECHNICAL GUILD ("LOCAL 375"),

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

APPENDIX

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S.D.N.Y.-N.Y.C.
07-cv-2235
Griesa, J.

United States Court Of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl street, in the City of New York, on the 1st day of March, two thousand eleven,

Present:

Amalya L. Kearse,
Robert D. Sack,
Robert A. Katzmann,
Circuit Judges.

In re Polina Gertskis, 10-3958-op

Petitioner

Petitioner, pro se, has filed a petition for a writ of mandamus, and moves(1) to expedite her mandamus petition, or, alternatively, for an order certifying the petition for appeal;(2) for an order converting her petition into a "petition for review of an agency decision" pursuant to Rule 15 of the Federal Rules of

Appellate Procedure; and (3) to vacate Court's October 2010 decision denying her request for a rehearing of her appeal. Upon due consideration, it is hereby ORDERED that the mandamus petition, and the motion to convert her petition into a petition for review of and agency decision, are DENIED because this Court lacks jurisdiction to issue such a writ to, or to review of the decision of, a state agency. *See Davis v. Lansing*, 851 F.2d 72, 74(2d Cir. 1988). It is further ORDERED that the motion to expedite the mandamus petition is DENIED as moot. It is further ORDERED that the motion to vacate this Court's decision denying her requests for rehearing is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

SAO – JY

09-2458-cv
Gertskis v. NYC D.O.H.M.H.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 25th day of October, two thousand
ten.

Polina Gertskis,
Plaintiff-Appellant,
v.
09-2458-cv

NYC D.O.H.M.H., Peter Backman, DC-37 Local 375, American Federation of State, County and Municip, District Council 37, Civil Service Technical Guild,

Defendants-Appellees.

Polina Gertskis having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc, IT IS HEREBY ORDERED that the petition is denied

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

FOR PLAINTIFF-APPELLANT:
Polina Gertskis, pro se, Brooklyn, N.Y.
FOR DEFENDANTS-APPELLEES
N.Y.C. D.O.H.M.H and Peter Backman: Ivan A. Mendez, Jr., Sharyn Michele Rootenberg,
New York City Law Department, New York, N.Y.
FOR DEFENDANTS-APPELLEES
DC-37, American Federation of State,
County and Municipal Employees, and Local 375:
Maureen M. Stampp, Lewis Brisbois Bisgaard & Smith, LLP, New York, N.Y.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is **AFFIRMED** and Appellant's motion for a stay of city administrative proceedings, pending appeal, is **DENIED**.

Plaintiff-Appellant Polina Gertskis, pro se, appeals from the judgment of the United States District Court for the Southern District of New York (Griesa, J.), granting summary judgment to Defendants-Appellees on her discrimination claims, pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq.; 42 U.S.C. §§ 1981 and 1983; the New York State Human Rights Law; and the New York City Human Rights Law; and on her duty of fair representation claims under New York state law. We assume the parties' familiarity with the facts and procedural history of this case.

We review orders granting summary judgment de novo and focus on whether the district court properly concluded that there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. Miller v. Wolpoff &

Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003). We analyze discrimination claims under the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Terry v. Ashcroft, 336 F.3d 128, 140-41 (2d Cir. 2003) (applying McDonnell Douglas to Title VII claims). The burden-shifting framework articulated in McDonnell Douglas also applies to employment discrimination claims brought under §§ 1981 and 1983. See, e.g., Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 123 (2d Cir. 2004); Sorlucco v. New York City Police Dep't, 888 F.2d 4, 7 (2d Cir.1989); Choudury v. Polytechnic Inst. of N.Y., 735 F.2d 38, 44 (2d Cir. 1984).

Before bringing suit in federal court, a private plaintiff under Title VII must file timely administrative charges with the U.S. Equal Employment Opportunity Commission ("EEOC") and receive a right-to-sue letter. See 42 U.S.C. §§ 2000e-5(e)(1), (f)(1). Where, as here, Gertskis had already filed the charge with the New York state agency, the charge needed to be filed with the EEOC within 300 days of the alleged discrimination. See 42 U.S.C. § 2000e-5(e); Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 712 (2d Cir. 1996). We conclude, for substantially the same reasons stated by the district court, that Gertskis claims based on conduct occurring before February 24, 2006, were time-barred.

Having conducted an independent and de novo review, we further conclude that Gertskis sexual harassment claim fails because the record evidence is insufficient as a matter of law to permit a reasonable jury to find in favor of her. See Distasio v.

Perkin Elmer Corp., 157 F.3d 55, 61-62 (2d Cir. 1998). Likewise, Gertskis Title VII, §§ 1981 and 1983 claims fail because she did not demonstrate that Defendants Appellees' non-discriminatory, legitimate business reasons for the alleged discriminatory employment actions were a pretext for discrimination. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-56 (1981); McDonnell Douglas, 411 U.S. at 802-04; see also Fisher v. Vassar Coll., 70 F.3d 1420, 1433 (2d Cir. 1995) ("[T]he plaintiff must also prove by a preponderance of the evidence that defendant's stated reason is a pretext for discrimination" by establishing "both that the reason was false, and that discrimination was the real reason.") (internal quotation marks omitted).

Finally, the District Council 37 and Local 375 of the American Federation of State, County, and Municipal Employees is a municipal union organized pursuant to the New York State Fair Employment Act. Under New York state law, "a claim against a union for violating the duty of fair representation is subject to a four-month statute of limitations." Williams v. New York City Hous. Auth., 458 F.3d 67, 69 (2d Cir. 2006); see N.Y. C.P.L.R. § 217(2)(a). The four-month limitations period begins to run when: (1) the plaintiff knew or should have know of the union's breach of its duty of fair representation; or (2) the plaintiff suffered harm from that breach, whichever is later. N.Y. C.P.L.R. § 217(2)(a); see Schermerhorn v. Metro. Transp.

Auth., 156 F.3d 351, 353 (2d Cir. 1998) (per curiam). Gertskis filed her complaint on March 15, 2007, and thus we conclude for substantially the same reasons stated by the district court that her duty of fair representation claims based on conduct occurring before November 15, 2006, were time-barred.

We have considered Gertskis remaining claims and find them to be without merit.

For the reasons stated above, the judgment of the district court is **AFFIRMED** and Gertskis's motion for a stay of city administrative proceedings, pending appeal, is **DENIED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

09-2458-cv
Gertskis v. NYC D.O.H.M.H.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARYORDER").A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of April, two thousand ten.

PRESENT:
GUIDO CALABRESI,
CHESTER J. STRAUB,
ROBERT A. KATZMANN,
Circuit Judges.

Polina Gertskis,
Plaintiff-Appellant,
v.

09-2458-cv

NYC D.O.H.M.H., Peter Backman, DC-37 Local 375, American Federation of State, County and Municip, District Council 37, Civil Service Technical Guild, Defendants-Appellees.

FOR PLAINTIFF-APPELLANT:
Polina Gertskis, pro se, Brooklyn, N.Y.
FOR DEFENDANTS-APPELLEES
N.Y.C. D.O.H.M.H and Peter Backman: Ivan A. Mendez, Jr., Sharyn Michele Rootenberg, New York City Law Department, New York, N.Y.
FOR DEFENDANTS-APPELLEES
DC-37, American Federation of State, County and Municipal Employees, and Local 375: Maureen M. Stampp, Lewis Brisbois Bisgaard & Smith, LLP, New York, N.Y.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is **AFFIRMED** and Appellant's motion for a stay of city administrative proceedings, pending appeal, is **DENIED**.

Plaintiff-Appellant Polina Gertskis, pro se, appeals from the judgment of the United States District Court for the Southern District of New York (Griesa, J.), granting summary judgment to Defendants-Appellees on her discrimination claims, pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq.; 42 U.S.C. §§ 1981 and 1983; the New York State Human Rights Law; and the New York City Human Rights Law; and on her duty of fair representation claims under New York state law. We assume the parties' familiarity with the facts and procedural history of this case.

We review orders granting summary judgment de novo and focus on whether the district court properly concluded that there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003). We analyze discrimination claims under the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Terry v. Ashcroft, 336 F.3d 128, 140-41 (2d Cir. 2003) (applying McDonnell Douglas to Title VII claims). The burden-shifting framework articulated in McDonnell Douglas also applies to employment discrimination claims brought under §§ 1981 and 1983. See, e.g., Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 123 (2d Cir. 2004); Sorlucco v. New York City Police Dep't, 888 F.2d 4, 7 (2d Cir.1989); Choudury v. Polytechnic Inst. of N.Y., 735 F.2d 38, 44 (2d Cir. 1984).

Before bringing suit in federal court, a private plaintiff under Title VII must file timely administrative charges with the U.S. Equal Employment Opportunity Commission ("EEOC") and receive a right-to-sue letter. See 42 U.S.C. §§ 2000e-5(e)(1), (f)(1). Where, as here, Gertskis had already filed the charge with the New York state agency, the charge needed to be filed with the EEOC within 300 days of the alleged discrimination. See 42 U.S.C. §

2000e-5(e); Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 712 (2d Cir. 1996). We conclude, for substantially the same reasons stated by the district court, that Gertskis claims based on conduct occurring before February 24, 2006, were time-barred.

Having conducted an independent and de novo review, we further conclude that Gertskis sexual harassment claim fails because the record evidence is insufficient as a matter of law to permit a reasonable jury to find in favor of her. See Distasio v. Perkin Elmer Corp., 157 F.3d 55, 61-62 (2d Cir. 1998). Likewise, Gertskis Title VII, §§ 1981 and 1983 claims fail because she did not demonstrate that Defendants Appellees' non-discriminatory, legitimate business reasons for the alleged discriminatory employment actions were a pretext for discrimination. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-56 (1981); McDonnell Douglas, 411 U.S. at 802-04; see also Fisher v. Vassar Coll., 70 F.3d 1420, 1433 (2d Cir. 1995) ("[T]he plaintiff must also prove by a preponderance of the evidence that defendant's stated reason is a pretext for discrimination" by establishing "both that the reason was false, and that discrimination was the real reason.") (internal quotation marks omitted).

Finally, the District Council 37 and Local 375 of the American Federation of State, County, and Municipal Employees is a municipal union organized pursuant to the New York State Fair Employment Act. Under New York state law, "a claim against a union for violating the duty of fair representation is subject to a four-month statute of limitations." Williams v. New York City Hous. Auth., 458 F.3d 67, 69 (2d Cir. 2006); see N.Y. C.P.L.R. § 217(2)(a). The four-month limitations period begins to run when: (1) the plaintiff knew or should have know of the union's breach of its duty of fair representation; or (2) the plaintiff suffered harm from that breach, whichever is later. N.Y. C.P.L.R. § 217(2)(a); see Schermerhorn v. Metro. Transp.

Auth., 156 F.3d 351, 353 (2d Cir. 1998) (per curiam). Gertskis filed her complaint on March 15, 2007, and thus we conclude for substantially the same reasons stated by the district court that her duty of fair representation claims based on conduct occurring before November 15, 2006, were time-barred.
We have considered Gertskis remaining claims and find them to be without merit.
For the reasons stated above, the judgment of the district court is **AFFIRMED** and Gertskis's motion for a stay of city administrative proceedings, pending appeal, is **DENIED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

POLINA GERTSKIS, Plaintiff, - against NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, ET AL., Defendants.

07 Civ. 2235 (TPG)

JUDGMENT

Defendants having moved for summary judgment, and the matter having come before the Honorable Thomas P, Griesa, United States District Judge, and the Court, on March 26, 2009, having rendered its Opinion granting defendant's motions for summary judgment, and dismissing the case, it is, **ORDERED, ADJUDGED AND DECREED:** that for the reasons stated in the Courts Opinion dated March 26, 2009, defendants' motions for summary judgment is granted, and the case is dismissed.

Deted: New York, New York
March 24, 2009

J. Michael McMahon
Clerk of Court
BY: /s/
Deputy Clerk
THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 03/27/2009

POLINA GERTSKIS, Plaintiff, - against NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, ET AL., Defendants.

07 Civ. 2235 (TPG)

SUBSEQUENT HISTORY: Affirmed by, Stay denied by ***Gertskis*** *v. N.Y. City Dep't of Health & Mental Hygiene, 2010 U.S. App. LEXIS 8975 (2d Cir. N.Y., Apr. 30, 2010)*

PRIOR HISTORY: ***Gertskis*** *v. N.Y. City Dep't of Health & Mental Hygiene, 2008 U.S. Dist. LEXIS 75288 (S.D.N.Y., Sept. 29, 2008)*

COUNSEL: [*1] Polina **Gertskis,** Plaintiff, Pro se, Brooklyn, NY.

For NYC D.O.H.M.H., Mr. Peter Backman, Defendants: Ivan A. Mendez, Jr., NYC Law Department, Office of the Corporation Counsel, New York, NY; Maureen Maria Stampp, Lewis Brisbois Bisgaard & Smith LLP (Water St), New York, NY.

For DC-37 Local 375, American Federation of State, County & Municipal Employees, AFL-CIO, District Council 37, Civil Service Technical Guild, Defendants: Maureen Maria Stampp, Lewis Brisbois Bisgaard & Smith LLP (Water St), New York, NY.

JUDGES: Thomas P. Griesa, United States District Judge.

OPINION BY: Thomas P. Griesa

OPINION

This case is brought by *pro se* plaintiff Polina **Gertskis** against her former employer, the New York City Department of Health and Mental Hygiene ("DOHMH"), and an official at DOHMH named Peter Backman (collectively, the "City defendants"), as well as plaintiff's former union, District Council 37 and Local 375 of the American Federation of State, County, and Municipal Employees (collectively, "the Union").

Plaintiff asserts that the City defendants discriminated against her on the basis of her sex, national origin, and religion, sexually harassed her, and retaliated against her for filing complaints of discrimination. Plaintiff [*2] also asserts that the Union breached its duty to her of fair representation. Plaintiff's claims are brought under *42 U.S.C. §§ 1981* and *1983*, Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, *section 296 of New York's Human Rights Law*, and *section 8-107 of the New York City Administrative Code*.

Defendants move for summary judgment. The motions are granted.

Facts

The following facts are undisputed, except where otherwise indicated.

Plaintiff is Jewish, female, and was born in the Ukraine. She immigrated to the United States in 1988 and became a U.S. citizen in 1989. In 1993, she was hired by DOHMH as an Assistant Chemist in the Public Health Laboratory, which tests a variety of samples for substances such as lead, drugs, and toxins.

The events at issue in this litigation began in 2001, when plaintiff received a performance evaluation from her supervisor rating her as "very good," rather than "outstanding." Plaintiff alleges that her supervisor chose not to assign her an "outstanding" rating solely because she is Jewish. Plaintiff also alleges that beginning in October 2003, the same supervisor assigned fewer overtime hours to plaintiff than he did to other staff, again [*3] for discriminatory reasons. This prevented plaintiff from earning the extra compensation that would have been paid for such work.

In November 2003, plaintiff and two other DOHMH Assistant Chemists filed grievances under their union contract claiming that they were working "out of title." That is, they asserted that they were performing the duties of an Associate Chemist, a more senior position, without being compensated at that level. DOHMH issued a decision on these grievances in April 2004. It found that one of plaintiff's colleagues was working out of title, and was therefore entitled to be promoted to the position of Associate Chemist. Plaintiff's grievance, however, was denied. As discussed below, the Union appealed this decision on plaintiff's behalf.

On May 5, 2004, plaintiff submitted the first of at least four complaints to the DOHMH Equal Employment Opportunity ("EEO") office. The complaint alleged that her supervisor had failed to promote her because of her Ukrainian origin. The EEO office determined that the complaint was unsubstantiated.

In October 2004, plaintiff applied for a vacant Associate Chemist position. However, DOHMH did not consider her application because it was [*4] received after the application deadline had passed.

On October 10, 2004, plaintiff submitted her second complaint to the EEO office. She alleged that her supervisor discriminated against her because of her religion by being overly critical of her work and failing to distribute overtime opportunities equitably. The EEO office determined that this complaint was also unsubstantiated.

On December 9, 2004, plaintiff applied and was interviewed for another vacant Associate Chemist position. Plaintiff was given a score of 14.5 for the interview, which placed her sixth in the group of ten employees interviewed. DOHMH ultimately awarded the position to another DOHMH employee, also a Ukrainian, Jewish woman, who had received an interview score of 25, had a broader educational background than plaintiff, and had undertaken a broader set of responsibilities at DOHMH than had plaintiff.

In February 2005, another Associate Chemist position became available. DOHMH reviewed the pool of candidates who had applied for the December 2004 vacancy, which included plaintiff, and offered the position to an individual from the private sector, a Nigerian woman. Although plaintiff had received a slightly higher [*5] interview score than the other individual, DOHMH believed that plaintiff did not have as much experience operating a type of laboratory equipment that would be central to the work of that position. Plaintiff, however, contends that she had sufficient experience with that equipment. Around the same time, another Assistant Chemist was given an "Associate Chemist" title. DOHMH states that this was done because the employee was also DOHMH's Quality Assurance Officer, and that this change did not require a salary increase.

On February 14, 2005, two Associate Chemists were assigned to supervise plaintiff. According to DOHMH, this occurred because the Associate Chemist who was supervising her had been assigned additional administrative responsibilities, and no longer had time to directly supervise laboratory work. According to plaintiff, this was done in retaliation for various complaints that she had made.

In April 2005, plaintiff asked for approval to take vacation for most of August 2005. Backman denied the request because plaintiff's laboratory was typically very busy in August, and plaintiff's absence during that time would have been disruptive to the laboratory's work. Plaintiff filed [*6] a grievance to challenge this decision, but the grievance was resolved when plaintiff agreed to take vacation somewhat later than she had initially requested.

On June 1, 2005, plaintiff submitted a third complaint to the EEO office alleging that she had not been promoted to an Associate Chemist position as a result of her sex, religion, and national origin. The EEO office determined that this complaint had no merit.

On July 21, 2005, according to plaintiff, Backman displayed a "facial expression of lust" during a conversation with plaintiff.

In October 2005, plaintiff met with Backman and alleged that her name had been improperly removed from hundreds of DOHMH records. She claimed that this was done in order to undermine her claim that she was working out of title. In response, Backman assigned a DOHMH employee to investigate the claim. After meeting with plaintiff and reviewing the relevant records, the investigator determined that plaintiff's claim was unsubstantiated. Plaintiff claims that around the same time, Backman visited her office and tried to kiss her.

On November 9, 2005, an arbitration was held to consider whether plaintiff's out-of-title grievance had been properly decided [*7] in 2004. The arbitration was held before a neutral arbitrator selected by the parties. Defendant Backman acted as DOHMH's representative, and an attorney from the Union represented plaintiff. However, the Union attorney refused to offer into evidence certain documents that plaintiff had obtained from DOHMH files. The attorney believed that these documents, which apparently included patient medical records, were protected by federal privacy laws and had been removed from DOHMH without permission. On December 21, 2005, the arbitrator affirmed the denial of plaintiff's grievance.

Plaintiff asked the Union to seek to vacate the arbitrator's decision, but the Union denied this request because it did not believe that there were any grounds for such action. Plaintiff was dissatisfied with this decision, and therefore challenged the Union's representation before the Board of Collective Bargaining of the City of New York. Specifically, plaintiff claimed that, at the arbitration, the Union attorney should have introduced into evidence the documents discussed above. The Board of Collective Bargaining dismissed this complaint on April 6, 2006.

On May 6, 2006, plaintiff alleges that Backman again [*8] visited her workspace, this time with another DOHMH official, and displayed "derogatory facial expressions of a sexual nature" while speaking to her.

On June 2, 2006, plaintiff asked to take a one-year unpaid leave of absence, from July 2006 to July 2007. Her request was approved. However, she did not return to work as scheduled, and her current status is officially "absent without leave."

In late 2006, plaintiff sought the Union's assistance again, which was denied as follows. On October 23, 2006, the Union denied plaintiff's request for assistance with filing another out-of-title grievance. On November 14, 2006, the Union denied plaintiff's request for assistance in filing a sexual harassment lawsuit.

On November 8, 2006, plaintiff filed a fourth complaint with the EEO office. Like her June 2005 complaint, this complaint alleged that she had not been promoted to an Associate Chemist position because of her sex, religion, and national origin. The EEO office determined that this complaint had no merit.

On December 21, 2006, plaintiff filed a complaint with the U.S. Equal Employment Opportunity Commission ("EEOC") that raised many of the discrimination and harassment claims asserted here. [*9] She amended the EEOC complaint on January 25, 2007.

On March 15, 2007, plaintiff filed the instant action. On May 29, 2007, she filed an EEOC complaint alleging, among other things, retaliation for bringing this case. On August 14, 2007, plaintiff filed an amended complaint with leave of the court.

Plaintiff's lengthy allegations against the City defendants can be summarized as follows. First, she alleges that by failing to promote her, requiring her to perform out-of-title work, altering records related to her out-of-title grievance, and failing to adequately investigate her EEO claims, City defendants discriminated against her on the basis of national origin, religion, and sex. Second, she alleges that by assigning her a "very good" rating rather than an "outstanding" rating in her 2001 performance evaluation, and by preventing her from earning sufficient overtime, City defendants discriminated against her on the basis of religion. Third, she alleges that City defendants discriminated against her on the basis of sex by changing her supervisors in February 2005 and by disapproving her request for vacation time in April 2005. Fourth, she alleges that defendant Backman sexually harassed [*10] her on July 21, 2005 and May 6, 2006 by displaying lewd facial expressions. Fifth, she alleges that the City and Backman retaliated against her for filing EEO complaints and this lawsuit by denying her request to review her personnel file and refusing to issue a letter of reference on her behalf.

Plaintiff's primary claim against the Union is that it breached its duty of fair representation by failing to adequately represent her at the arbitration and by refusing to assist her in October and November 2006.

In separate motions, the City defendants and the Union have moved for summary judgment on plaintiff's claims.

The City Defendants' Motion

Summary judgment may be granted if "there is no genuine issue as to any material fact," such that the "movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. In making this determination, the court must draw all justifiable inferences in favor of the non-movant. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

Statutes of Limitations

As a threshold matter, City defendants argue that plaintiff's Title VII claims are time-barred.

For a cause of action under Title VII to be timely, a plaintiff must have filed a claim with the [*11] EEOC within 300 days of the occurrence of the allegedly unlawful employment practice. *42 U.S.C. § 2000e-5(e)(1)*. Under the recently enacted Ledbetter Fair Pay Act, "an unlawful employment practice occurs ... when a discriminatory compensation decision or other practice is adopted ... or when an individual is affected by application of a discriminatory ... practice, including each time wages, benefits, or other compensation is paid" as a result of such a practice. *Id. § 2000e-5(e)(3)(A)*. Since plaintiff's first complaint to the EEOC was filed on December 21, 2006, any Title VII claims accruing before February 24, 2006, are time-barred.

With only insignificant exceptions, plaintiff's Title VII claims are timely. The crux of plaintiff's claims is that she received inadequate compensation as a result of DOHMH's repeated and allegedly discriminatory failures to promote her to the Associate Chemist position. These decisions continued to affect plaintiff until she began her leave of absence in June 2006. Most of her Title VII claims are therefore not time-barred.

However, plaintiff's Title VII claims with respect to her 2001 performance evaluation, the change in supervisors in 2005, the denial of [*12] a vacation request in 2005, and the award of overtime hours prior to February 24, 2006, are time-barred. Nonetheless, plaintiff also challenges these actions under New York law and *42 U.S.C. §§ 1981* and *1983*, which provide for a three-year limitations period. *Patterson v. County of Oneida, 375 F.3d 206, 225 (2d Cir. 2004)*; *N.Y. C.P.L.R. § 214*; *N.Y. City Admin Code. § 8-502(e)*. With the exception of the claim relating to the 2001 performance evaluation, those claims are not time-barred.

The Discrimination Claims

To withstand a motion for summary judgment, plaintiff's claims must survive the burden-shifting framework established by *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. The same analysis is applied to plaintiff's claims under Title VII, *§§ 1981* and *1983*, New York state law, and New York City regulations. *Patterson, 375 F.3d at 226-27*; *Demoret v. Zegarelli, 451 F.3d 140, 152 (2d Cir. 2006)*; *Landwehr v. Grey Adver. Inc., 211 A.D.2d 583, 622 N.Y.S.2d 17 (1st Dep't 1995)*.

Under this framework, plaintiff has the initial burden of establishing a prima facie case of discrimination by showing, by a preponderance of the evidence, that defendants' actions give rise to an inference of unlawful [*13] discrimination. *Id.* This can be satisfied by demonstrating membership in a protected class, qualification for the position, an adverse employment action, and preference for a person not of the protected class. *Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)*; *James v. N.Y. Racing Assn, 233 F.3d 149, 153-54 (2d Cir. 2000)*. In particular, to qualify as an adverse employment action, there must have been a materially adverse change in the terms and conditions of employment, such as termination or demotion. *Mathirampuzha v. Potter, 548 F.3d 70, 78-79 (2d Cir. 2008)*. The burden then shifts to defendants, who must "articulate some legitimate, nondiscriminatory reason" for their actions. *Id.* Finally, plaintiff may attempt to demonstrate that the reason articulated by defendants was in fact pretext. *Id. at 804*.

Plaintiff has failed to carry her burden with respect to her discrimination claims. First, none of the DOHMH's decisions not to promote plaintiff appear to have been made for discriminatory reasons. The December 2004 promotion was given to another Ukrainian, Jewish woman instead of plaintiff, indicating that DOHMH did not display a preference for someone outside the protected [*14] class. With respect to both the December 2004 and the March 2005 promotions, defendants have stated that other candidates were selected because their backgrounds were significantly better suited to the position than plaintiff's. With regard to the October 2004 promotion, DOHMH has stated that plaintiff's application was submitted after the deadline. Plaintiff has not demonstrated that these explanations were mere pretext.

Second, plaintiff has failed to raise a genuine issue of fact or establish a prima facie case of discrimination with respect to her claims of out-of-title work. Plaintiff was determined in a grievance hearing not to have been performing the duties of an Associate Chemist. This determination was consistent with DOHMH's subsequent decision not to promote plaintiff in part because she did not have sufficient experience performing the duties of an Associate Chemist. Plaintiff has produced no evidence to suggest that her supervisors forced her to undertake extra work for discriminatory reasons. Similarly, there is no genuine issue of fact with regard to plaintiff's claims that DOHMH discriminated against her by falsifying records regarding her work. DOHMH investigated those [*15] claims and found them to be unsubstantiated, and plaintiff has produced no evidence that her claims had any merit.

Third, with regard to the overtime opportunities, even if plaintiff had established a prima facie case, City defendants have offered two reasons to explain why plaintiff earned less money from overtime than some of her colleagues. First, plaintiff frequently refused to work overtime. Second, supervisors were careful to ensure that overtime funds were used only when necessary, and it often appeared to plaintiff's supervisor that she would attempt to allocate work to overtime hours that could have been completed during the regular work day. In support of this explanation, DOHMH has produced evidence demonstrating that plaintiff's productivity during the regular work day was significantly lower than that of her colleagues. Plaintiff has produced no evidence to rebut these explanations.

Fourth, plaintiff's remaining claims do not establish a prima facie case of discrimination because they do not amount to adverse employment actions. When plaintiff's supervisors were changed and her vacation request was denied, she did not suffer a materially adverse change in the conditions [*16] of her employment. With respect to plaintiff's claim that the DOHMH EEO office discriminated against her by failing to investigate her complaints, that claim is flatly contradicted by the EEO office's detailed reports of its investigations.

Finally, it is worth noting that plaintiff's laboratory appears to have been a rather diverse workplace in which people from a wide variety of ethnic and religious backgrounds were hired and promoted. The employment decisions appear to have been made based on the individual qualifications of these employees, without regard to national origin, sex, or religion.

The Sexual Harassment Claim

Plaintiff alleges that Backman sexually harassed her on three occasions. The complaint alleges two instances of offensive conduct, both of which amount to apparently lewd facial expressions that Backman purportedly made during conversations with plaintiff. The complaint does not allege that Backman's harassment was of a verbal or physical nature. However, in opposing the instant motion, plaintiff raised a new allegation that Backman attempted to kiss her and implied that she would not prevail in the grievance arbitration unless she complied with his demands.

Claims [*17] of sexual harassment are placed into one of two categories. First, a plaintiff may claim that an employer took a "tangible employment action," such as firing or failing to promote her, because she refused to submit to a supervisor's sexual demands. *Mormol v. Costco Wholesale Corp., 364 F.3d 54, 57 (2d Cir. 2004).* In order to qualify as a tangible employment action, the action must constitute a "significant change in employment status." *Id. at 58.* Second, a plaintiff may claim that an employer altered the conditions of employment by creating a hostile work environment through sexual harassment. *Leibovitz v. N.Y. City Transit Auth., 252 F.3d 179, 188 (2d Cir. 2001).* In order to show that a hostile work environment was created, a plaintiff must demonstrate both that "she personally considered the environment hostile, and that the environment rose to some objective level of hostility." *Id.* The objective indicators of hostility include the nature, frequency, and severity of the discriminatory conduct, and whether it unreasonably interferes with an employee's work performance. *Id.*

Plaintiff has failed to demonstrate that there is any issue of fact with regard to her sexual harassment claims.

First, [*18] plaintiff was not subject to either a tangible employment action or a hostile work environment as a result of the alleged encounters with Backman. Indeed, virtually no change in her employment occurred during the relevant timeframe. Notably, DOHMH's decisions not to promote plaintiff were made before either of these encounters. Although she alleges, in essence, that she lost the grievance arbitration because she rejected Backman's demands, the matter was decided by a neutral arbitrator. Plaintiff also alleges that after she rejected Backman's first advance, her supervisors were changed, she was awarded insufficient overtime, and her vacation request was denied partially as a result of these encounters. As discussed above, however, these actions were not significant enough to constitute either a tangible employment action or a hostile work environment.

Second, the allegation regarding Backman's attempt to kiss plaintiff, which is not even properly before the court, has no merit. Again, plaintiff apparently never reported such an incident to anyone at DOHMH. In e-mails that plaintiff sent to the EEO office contemporaneously, in October 2005, she complained about various statements made [*19] by Backman but did not allege any sexual harassment. Although plaintiff had filed three complaints with the EEO office by that point, she waited one year after this alleged incident before filing another one, and still did not make the allegation of an attempted kiss. Finally, when plaintiff filed a complaint with the EEOC and the complaint in the instant case, she confined her allegations of sexual harassment to the facial expressions, and did not make this additional allegation until considerably later in the litigation.

The Retaliation Claim

Plaintiff alleges that in response to her filing of this lawsuit and an EEOC complaint, City defendants retaliated against her by refusing to issue a letter of reference on her behalf, and by denying her request to review her personnel file. As indicated, the request for this file came after the commencement of this action.

Plaintiff has produced absolutely no evidence that these actions occurred. On the other hand, City defendants have produced an affidavit stating that in response to a request from one potential employer for information about plaintiff's employment, DOHMH officials provided all of the information requested. The record also indicates [*20] that plaintiff was provided with a significant amount of information during discovery in this case, including her personnel file. There is therefore no genuine issue of fact with regard to plaintiff's allegations of retaliation.

The Union's Motion

Plaintiff asserts that the Union breached its duty of fair representation and discriminated against her by (1) inadequately representing her at the November 2005 arbitration, (2) declining to assist her in filing another out-of-title grievance on October 23, 2006, and (3) declining to assist her with a sexual harassment claim on November 14, 2006.

Unions have a duty of fair representation toward their members that is breached "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes, 386 U.S. 171, 190, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967)*. Under New York law, a claim that a union breached its duty of fair representation of a member must be brought within four months of the date that the employee "knew or should have known that the breach has occurred" or was harmed by the breach. *N.Y. C.P.L.R. § 217(2)(a)*.

Plaintiff's claim that the Union inadequately represented her at the arbitration therefore [*21] accrued, at the latest, when the arbitrator issued a decision on December 21, 2005. The relevant time period expired on April 21, 2006. Since plaintiff filed this action on March 15, 2007, this claim is time-barred. Plaintiff's claim regarding the decision on October 23, 2006 not to file a grievance on her behalf is also time-barred. That claim should have been brought by February 23, 2007. The filing of this action on March 15, 2007, was therefore untimely.

Plaintiff's claim regarding the November 14, 2006 decision to deny her assistance in filing a sexual harassment claim is also, technically, untimely. However, since this action was filed just after the four-month period ended, the court will consider this claim on the merits. As discussed above, there was no merit to plaintiff's sexual harassment allegations. The record is clear that the Union diligently represented plaintiff in a significant number of disputes with management, even when plaintiff's positions in those disputes were of questionable merit. Plaintiff has offered no evidence to suggest that the Union decided not to assist her with the sexual harassment claim for improper reasons. There is no basis for finding that the [*22] Union's conduct toward her was arbitrary, discriminatory, or in bad faith.

Conclusion

Plaintiff has failed to raise a genuine issue of material fact with regard to her claims, and defendants are entitled to summary judgment in their favor. The motions for summary judgment are granted, and this case is dismissed.

SO ORDERED.

Dated: New York, New York
March 26, 2009

/s/ Thomas P. Griesa
Thomas P. Griesa
U.S.D.J.

POLINA GERTSKIS, Plaintiff, - against NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, ET AL., Defendants.

07 Civ. 2235 (TPG)

COUNSEL: [*1] Polina **Gertskis,** Plaintiff, Pro se, Brooklyn, NY.

For NYC D.O.H.M.H., Mr. Peter Backman, Defendants: Ivan A. Mendez, Jr., NYC Law Department, Office of the Corporation Counsel, New York, NY; Maureen Maria Stampp, Lewis Brisbois Bisgaard & Smith LLP (Water St), New York, NY.

For DC-37 Local 375, Defendant: Maureen Maria Stampp, Lewis Brisbois Bisgaard & Smith LLP (Water St), New York, NY.

JUDGES: Thomas P. Griesa, United States District Judge.

OPINION BY: Thomas P. Griesa

OPINION

Pro se plaintiff Polina **Gertskis** moves for leave to file a second amended complaint in her employment discrimination case. Defendants oppose the motion. The motion is denied.

Background

This case is brought by *pro se* plaintiff Polina **Gertskis** against her former employer, the New York City Department of Health and Mental Hygiene ("DOHMH"); plaintiff's DOHMH supervisor, Peter Backman; and plaintiff's former union, District Council 37 and Local 375 of the American Federation of State, County, and Municipal Employees. Plaintiff has raised a variety of claims, including claims of unlawful discrimination on the basis of sex, national origin, and religion in violation of *42 U.S.C. § 1983* and Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*

Plaintiff [*2] amended the complaint on August 14, 2007, to add a claim of constructive discharge and to provide additional factual allegations. On February 19, 2008, shortly before the scheduled end of discovery, plaintiff filed the present motion seeking leave to further amend the complaint. The proposed complaint would add a new defendant, Dorothy Wright, the Director of Equal Employment Opportunity ("EEO") at DOHMH; would add a claim that defendants have conspired to deprive plaintiff of equal protection of the laws, in violation of *42 U.S.C. § 1985(3)*; and would add numerous factual allegations related to existing claims.

Discussion

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend should be "freely" given. This relaxed standard applies with particular force to *pro se* litigants. *Pangburn v. Culbertson, 200 F.3d 65, 70 (2d Cir. 1999)*. Nonetheless, leave may be denied under certain circumstances, including futility of the amendment. *See Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. An amendment may be denied as futile when it would be subject to immediate dismissal. *Jones v. N.Y. State Div. of Military & Naval Affairs, 166 F.3d 45, 55 (2d Cir. 1999)*.

Dorothy Wright

Plaintiff's allegations [*3] against Wright amount to a claim that Wright "intentionally condoned and approved the harassing and discriminatory behavior" allegedly exhibited by other defendants. Proposed Cplt. P 15. Plaintiff alleges that Wright failed to (1) investigate or remedy plaintiff's claims of discrimination; (2) produce certain documents to plaintiff; and (3) meet with plaintiff again after a contentious encounter on November 8, 2006. *Id.* Plaintiff also claims that another DOHMH employee told plaintiff that it was the "opinion of 'few managers' that Dorothy Wright discriminated against [plaintiff] because of [plaintiff's] skin color--white." *Id.* P 18(e).

These allegations lack two elements required to state a claim under *§ 1983*. First, a *§ 1983* plaintiff must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of discriminatory intent. *Patterson v. County of Oneida, 375 F.3d 206, 226 (2d Cir. 2004)*; *Yusuf v. Vassar College, 35 F.3d 709, 713 (2d Cir. 1994)*. None of plaintiff's allegations support an inference of discriminatory intent. The allegation about Wright acting intentionally, quoted above, is too broad and [*4] conclusory to be a sufficient allegation of intent. Even if Wright failed to investigate plaintiff's allegations, there is no allegation of circumstances indicating that this was motivated by discriminatory intent. Moreover, the proposed complaint actually indicates that Wright did investigate plaintiff's claims, a fact supported by documents submitted by plaintiff. *See* Proposed Cplt. PP 15(i), 18(d), and

18(f); *see also* Exh. 2 to Plaintiff's Reply Brief. The allegation of what was said by another employee as to discrimination by Wright--an unsubstantiated, double-hearsay accusation--does not suffice to create a "plausible inference" of discriminatory intent.

Second, plaintiff must allege Wright's personal involvement in a deprivation of constitutional rights. This requires a showing that Wright (1) directly participated in the deprivation, (2) created "a policy or custom fostering the unlawful conduct," (3) acted with deliberate indifference or failed to take corrective action after learning of a subordinate's conduct, or (4) was grossly negligent in supervising subordinates. *Hayut v. State Univ. of N.Y., 352 F.3d 733, 753 (2d Cir. 2003).* Plaintiff alleges that Wright failed to take [*5] necessary corrective action by declining to investigate plaintiff's claims. Yet, as discussed above, this allegation is belied by other statements in the proposed complaint indicating that Wright investigated plaintiff's claims and determined that the actions taken by plaintiff's supervisors were nondiscriminatory. *See* Proposed Cplt. PP 15(i), 18(d), and 18(f).

Since plaintiff has failed to sufficiently allege either discriminatory intent or the personal involvement of Wright, the proposed amended complaint would be subject to immediate dismissal. This amendment would therefore be futile even under the liberal standards applicable to *pro se* litigants.

Section 1985

Plaintiff has also failed to allege sufficient facts to satisfy the heightened pleading requirements of *§*

1985(3). Plaintiffs asserting a claim under *§ 1985* "must allege, with at least some degree of particularity, overt acts" by defendants that were "reasonably related" to the conspiracy. *Thomas v. Roach, 165 F.3d 137, 147 (2d Cir. 1999)*. Plaintiffs must also allege "an agreement, express or tacit, to achieve the unlawful end." *Webb v. Goord, 340 F.3d 105, 110 (2d Cir. 2003)* (citations and internal quotation marks omitted). [*6] Claims that are "couched in terms of conclusory allegations and fail[] to demonstrate some . . . invidiously discriminatory animus" are subject to dismissal. *Temple of Lost Sheep Inc. v. Abrams, 930 F.2d 178, 185 (2d Cir. 1991)* (citations and internal quotation marks omitted).

When the proposed complaint is liberally construed, it appears to contain three allegations in support of the *§ 1985* claim. First, plaintiff alleges that Wright and a union official communicated with each other regarding an "effort to enroll [plaintiff] in counseling." Proposed Cplt. P 13. Second, plaintiff alleges that "City and Union defendants conspired to deprive me of equal privileges guaranteed by federal law and by the United States Constitution by ignoring my pleads [sic] for transfer in a deferent [sic] location." *Id.* P 14. Third, plaintiff alleges that Wright "intentionally condoned and approved the harassing and discriminatory behavior by . . . [l]eading, in concert with the Union Defendants, [a] campaign to harass me and harm me." *Id.* P 15 and 15(h); *see also id.* P 18(g).

The crux of plaintiff's claim therefore appears to be that defendants conspired to deprive her of equal protection of the laws. However, [*7] plaintiff fails to allege either overt acts related to the purported conspiracy or an agreement to achieve an unlawful end. The only overt act alleged with any particularity is the communication between Wright and a union official in which they discussed an effort to enroll plaintiff in counseling. There is no indication, however, that these individuals were agreeing to "achieve an unlawful end," *see Webb, 340 F.3d at 110*, or that the communication was "reasonably related" to a conspiracy to deprive plaintiff of equal protection, *see Thomas, 165 F.3d at 147*. Plaintiff's remaining allegations--that defendants conspired to ignore her request for a job transfer and to harass her--are conclusory and fail to identify any overt acts related to the alleged conspiracy.

Since plaintiff has failed to satisfy the pleading standards of *§ 1985*, even when the proposed complaint is liberally construed, this amendment would be futile.

Other Proposed Changes

Plaintiff also seeks to add over thirty factual allegations in support of claims made in the first amended complaint. Since the two other grounds for amendment are being rejected, there is no valid reason, at this stage in the litigation, to have [*8] a second amended complaint for the purpose of adding a host of new details to the factual allegations.

Conclusion

The motion to file a second amended complaint is denied.

Dated: New York, New York
September 29, 2008
SO ORDERED
/s/ Thomas P. Griesa
Thomas P. Griesa
U.S.D.J.

CONFERENCE
POLINA GERTSKIS, Plaintiff, - against NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, ET AL., Defendants.
07 Civ. 2235 (TPG)

New York, N.Y.
November 7, 2007
10:15 a.m.

Before:

HON. THOMAS P. GRIESA

District Judge

APPEARANCES

POLINA GERTSKIS
Pro Se Plaintiff

NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL
Attorneys for defendant: DOHMH
BY: IVAN MENDEZ, JR.

LEWIS BISGAARD & SMITH
Attorneys for Defendant D.C. 37, Local 375
BY: MAUREEN STAMPP

SOUTHERN DISTRICT REPORTERS, P.C.

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(PAGES 7-12 REPRINTED)

MS. GERTSKIS: Your Honor, I actually brought another document that I'm asking your help for protective order and order to show cause, because I'm out of job for over a year and I ask for transfer, and defendants are not transferring me. I cannot work in the place where I have to face the harasser.

THE COURT: Were you discharged?

MS. GERTSKIS: No, I was not discharged. I originally- I was followed by deputy assistant commissioner constantly and I couldn't stand it anymore. I gave him a request for unpaid leave of absence for one year. And he told me he will file for it, and he gave me approval for this leave of absence. While on leave of absence, I filed EEO complaint alleging sexual harassment and ask for transfer. And transfer was never offered. And as a result of job, I ask union for another hearing, fair hearing for the out-of title job, and I didn't get any help either from union or from the city, and I need my job back.

MR. MENDEZ: Your Honor, if I could just interject very briefly. The plaintiff did request the one year unpaid leave of absence. While she was on her one year leave of absence...

THE COURT: Was that granted?

MR. MENDEZ: It was granted. While she was on that leave of absence, the lead lab where she was working was closed, and the city now contracts out all of its lead work, all of its lead testing, to a private company.

Now, the plaintiff, upon her return from her leave of absence, was offered another comparable position, the only comparable position that was available, like all of her other coworkers, in the lead lab. She rejected that position.

THE COURT: What was she offered?

MR. MENDEZ: She was offered another assistant chemist position within another lab. Where she was previously working.
Now, she alleges that she didn't want to take that position at the public health lab because Deputy Assistant Commissioner Backman, who she is accusing of sexual harassment, works there.
The department can't create a job that doesn't exist for plaintiff. We can only offer her jobs that we have. The type of work she is doing is only done at the public health lab. It's a very large facility. She wouldn't necessarily have to come into contact with the deputy...

THE COURT: Is that still open?

MR. MENDEZ: I can find out, your Honor. But at this point, the plaintiff has been absent without leave from her leave of absence. She never reported back.

THE COURT: When did the year expire?

MR. MENDEZ: Last June I believe.

MS. GERTSKIS: On July it expired.

THE COURT: Where you offered another job?

MS. GERTSKIS: I was offered microbiologist position, not assistant chemist position, in the same building where Mr. Backman is still a director. And he is in charge of all the laboratories. Also I applied on maybe 25 positions during my year of absence...

THE COURT: Look. You want me to order the city to give you a job; is that right?

MS. GERTSKIS: That's right.

THE COURT: What job do you want me to order them to give you?

MS. GERTSKIS: In different building. As assistant chemist, the same where I worked -- I mean, I'm not asking more than I was working for, but I am asking just to transfer from that building where I was harassed for the last three years and I couldn't stand it anymore. In fact, I received a lot of paperwork from the defendants where I found out that Mr. Backman claiming now that people might be injured if I return back to that place because they are afraid of me.

THE COURT: Well, look, I cannot possibly enter an injunction ordering the city to take you back to their employment. Now, if you can negotiate with the city and have them take you back, that's between you and the city.

MS. GERTSKIS: I'm trying. They are not even listening to me. They are not giving me any chances.

THE COURT: They may have their reasons for not. But I cannot order the city to take you back. I just can't do that.
I have no authority to do that.

MS. GERTSKIS: Okay, your Honor, would you able just to look in my order to show cause and see what you can do about it?

THE COURT: Well, I can look at the order to show cause.

MS. GERTSKIS: I would appreciate it greatly.
(Pause)

THE COURT: Look, I would have to have a substantial – look, this is not something that is appropriate for me to do in an action like this. And I have to deny this application.

MS. GERTSKIS: Your Honor, if I may.

THE COURT: I cannot do this. Now, the thing is, what is the problem about being in the same building with Mr. Backman? Is that his name?

MS. GERTSKIS: Yes, He's the director of the laboratories for over 30 years. He has a lot of power over every employee. Every order comes from him.

THE COURT: All right, but what about--

MR. MENDEZ: He would not be her direct supervisor, your Honor. And we would ensure for purposes of – we offered to ensure that he be insulated from any decision-making that would involve the plaintiff.

THE COURT: What are the allegations about sexual harassment?

MR. MENDEZ: The plaintiff is alleging that once her grievance process was set in motion regarding the out- of title work, that Mr. Backman took a great interest in assisting her and move her grievance forward. Now, three years or two years after the grievance was finally denied and the plaintiff exhausted the grievance proceedings, she begin to bring EEO allegations against Mr. Backman, alleging that he looks at her in a way as a boyfriend looks at a girlfriend, for example, and not as a supervisor looks at a subordinate. We strongly disagree with Ms. Gertskis' characterization.
Mr. Backman, I think the evidence will show, throughout the case has been nothing but helpful to her. He is in fact lobbied for Ms. Gertskis to have her one year unpaid leave of absence.
Which I note at the time she made at that request, she stated she was making that request for personal reasons so she could attend—she could help with the wedding of one of her children. Not because she was feeling harassed by Mr. Backman.

MS. GERTSKIS: Of course. He is the harasser. How will I tell him you are harassing me, that's why I want out of here.

MR. MENDEZ: Well, you Honor—

THE COURT: Look, look, I will have to tell you if there is any offer that the city makes to reemploy you, you should take it. It may be that the city won't make that offer. They have to consult. But to ask me to enter an order against the city under the circumstances that I've heard is really out of the question And so that's the end of that subject.

STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD

ADMINISTATIVE LAW JUDGE SECTION
P.O. BOX 697
NEW YORK, NY 10014-0697
(212) 352-6982

DECISION AND NOTICE OF DECISION

Mailed and Filed : APR.30 2007

A.L.J. Case No. 007-06803
IN THE MATTER OF
POLINA GERTSKIS
1745 E. 21 ST.
BROOKLYN, N.Y. 11229

NYC DOH BURREU OF
LABORATORY
455 FIRST AVE
NEW YORK, NY 10016

NEW YORK CITY
DCAS
1 CENTRE ST. 21ST FL
NEW YORK, NY 10007

Department of LABOR Office 801

Hearing Requested March 30, 2007

ISSUES : Voluntary leaving of employment without good cause.

The department of labor issued the initial determination disqualifying the claimant form receiving benefits, effective February 2, 2007, on the basis that the claimant voluntarily separated from employment without good cause. The claimant requested a hearing.

A hearing was held at which testimony was taken. There was an appearance by the claimant.

FINDINGS OF FACT: The claimant worked for a municipal agency from January 1993 until July 24, 2006. She worked full time and she earned $ 50, 000 per annum. She was a member of a union in contractual relationship with the employer.

Approximately 3 years prior to her separation from employment the claimant filed a grievance against the employer with the union because the employer assigned her out of title work. Thereafter the employer did not assign the claimant any over-time work although it assigned overtime to other employees with less seniority than her and it denied her request for vacation. The claimant likewise brought these matters to the attention of her union but they did not resolve these matters in a prompt manner and constantly changed the dates of her hearings. The claimant observed that the Deputy Assistant Commissioner was constantly checking on her and she felt as if though she was being stalked by him. On several occasions when he talked with her regarding her complaints he made gestures toward her during their conversation which the claimant deemed to be of a sexual nature. The claimant could no longer tolerate the atmosphere in which she was working and she took a leave of absence with the intention of seeking work within another department. She was assured by her union that it would attempt to get her another position.

However, although the claimant submitted numerous applications for positions for which she qualified she has not been successful in obtaining another position.

OPINION: Pursuant to Labor Law §593(1)(a), a claimant is disqualified from receiving benefits after a voluntary separation from employment without good cause.

The credible evidence established that since the claimant filed a grievance alleging that she was assigned out of title work she has been subjected to discriminatory and harassing behavior by the employer. I note that the claimant attempted to rectify these mattes through her union but it was to no avail. I conclude under these circumstances, that she quit her job with good cause under the law. Her employment ended under non - disqualifying conditions.

DECISION: The initial determination, disqualifying the claimant form receiving benefits, effective February 12, 2007, on the basis that the claimant voluntarily separated form employment without good case, is overruled.

The claimant is allowed benefits with respect to the issue decided herein.

/s/ Beverly Diego
Administrative Law Judge

THE UNITED STATES COURTS OF APPEALS
FOR THE SECOND CIRCUIT
---X
IN RE
POLINA GERTSKIS)
PETITIONER
V.

CITY OF NEW YORK DEPARTMENT
OF HEALTH & MENTAL HYGIENE,
THOMAS F. FARLEY AS COMMISSIONER,
ROSE TESSLER,
CITY OF NEW YORK OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS,
JOAN SALZMAN, ALJ
AMERICAN FEDERATION OF STATE,
COUNTY& MUNICIPAL EMPLOYEES,
AFL-CIO, DISTRICT COUNCIL 37("DC37")
& LOCAL 375, CIVIL SERVICE
TECHNICAL GUILD ("LOCAL 375")

RESPONDENTS.)

ON PETITION FOR WRIT OF MANDAMUS
This action arises under the United States Constitution Amendment XIV Section 1 28 U.S.C. § 1983

PETITIONER, Polina Gertskis hereby applies, pursuant to provisions of 28 U.S.C. § 1983, and Rule (21)(a) of the federal Rules of Appellate Procedure, for a Writ of Mandamus to be ISSUED by this Court seeking declaratory and injunctive relief, together with actual and punitive damages for malicious violations of statutory law 42 U.S.C. § 1983 U.S.; CSL § 75.1; NY CLS Labor § 623(1)(2*iv)* by former employer New York City Department of Health and Mental Hygiene (N.Y.C. D.O.H.M.H.), Office of Administrative Trials And Hearings (OATH) and Union for injuries suffered by petitioner, caused by the deprivation of constitutional rights and reinstatement to permanent Civil Service Position.

THE ISSUES PRESENTED

The central issues presented by an application for a writ are: whether petitioner, United States citizen and permanent Civil Service employee may be dismissed (unofficially terminated) for a constitutionally impermissible purpose without a hearing or a statement of reasons and in violation of statutory law, then officially terminated for absence, caused by the dismissal - therefore deprived of an interest in "liberty" and "property" without Due process in violation of constitutionally protected rights.

This action involve a common question of law and fact with the pending before this Court petition for hearing EN Bank and rehearing case # 09-2458 cv

THE REASONS WHY THE WRIT SHOULD ISSUE

39. Petitioner Constitutional rights have been infringed, because of her rightful exercise of First Amendment rights in petitioning government for redress of grievances and petitioner have no other remedy at law to raise her Constitutional depravations of her protected interest in " property"

and "liberty" and entitled to a relief by law and United States Constitution.

40. The action of Respondents terminating Petitioner was not only arbitrary and capricious, not based on competent/substantial evidence, constituted an abuse of discretion, including an abuse as to the penalty involved which is shocking to one's sense of fairness because it was done for constitutionally impermissible reasons and *in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.*

44. Petitioner have no other remedy at law to raise or appeal her unlawful termination.

I, Petitioner Polina Gertskis, declare under penalty of perjury that the forgoing is true and correct.

WHEREFORE, Petitioner respectfully requests MANDAMUS to be ISSUED:
(a) granting declaratory, injunctive relief with actual and punitive damages;
(b) revoking the decision to terminate Petitioner from her employment;
(c) restoring the Petitioner to the permanent Civil Service position in the appropriate to Court's finding of title/salary with backpay and tenure;
(d) declaration of petitioner's liberty to enter OATH public office/building;
(e) granting such other relief the Court deems proper.
10/01/10

Respectfully submitted,
/S/
Polina Gertskis, Petitioner Pro-Se

THE UNITED STATES COURTS OF APPEALS
FOR THE SECOND CIRCUIT

09-2458-cv

Polina Gertskis,
Plaintiff- Appellant,

v.

NYC D.O.H.M.H., Peter Backman, DC-37 Local 375,
American Federation of State, County and Municip,
District Council 37, Civil Service Technical Guild,

Defendants- Appellees.

Petition for hearing EN Bank and rehearing Under FRAP 35; FRAP 40

The panel decision conflicts with decisions of the United States Supreme Court *Harris v. Forklift Systems, Inc., 126 L. Ed. 2d 295 (1994); Boddie v. Connecticut (401 U.S. 371, 377);Burlington Industries, v. Ellerth 524 U.S. 742; Meritor Sav. Bank. v. Vinson, 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)*

and with precedent Second Circuit Court decisions *Kotcher v. Rosa 957 F.2d 59 (2d Cir. 1992); Karibian v. Columbia University, 14 F.3d 773, 780-81) Carrero v. New York City Hous. Auth., 890 F.2d 569, 577 (2d Cir. 1989).*
Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

Also several important facts and arguments were misapprehended or overlooked.

SECOND AMENDED COMPLAINT CLAIMS

Besides disposing of my race and §1985(3) claims, Courts disposed of my § 1983 Fourteenth Amendment, Equal Protection Clause claims without even mentioning it in the Opinion from 09/29/08 ("Opinion 1").

I raised legitimate complaints of depravation of my Constitutional rights, which District Court and panel found without merit. It is an error and it is conflicting with this Court and the Supreme Court decisions:

In *Boddie v. Connecticut (401 U.S. 371, 377)* Justice Harlan, speaking for the court on the issue of the right of an individual to be heard before being deprived of a property right, stated: " its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event"

I was denied § 75 hearing, to which I am entitled, *before* being deprived Civil Service position until present.

I presented facts corroborated by direct compelling admissible in Court evidence, that my former employer and union knew of the harassment for years, but refused to provide any relief or protection even after UIA 04/30/07 decision, which found *discriminatory and harassing behavior by the employer and inactivity of the Union* I was deprived of my equal protection rights by:

- DOHMH violating their own policy and failing to transfer my complaint to the General Council of the Agency after my complaint was filed with EEOC, as they must. There is no question whether I filed my complaint with the EEOC (as City falsely denies)- it is in their 56.1 statement
- forcing me out of EEO office on 11/08/06, when I filed my sexual harassment complaint and refusing interviewing me or follow up on my sexual harassment case, refusing investigation or acknowledgement of evidence such as letters and e-mails to EEO, documenting harassment.
- Failing to file 08/05 retaliation complaint with evidence of quid pro quo and hostile environment. Admissible in Court evidence field with Court.
- Eliminating discriminatory evidence submitted to EEO on 11/08/06
- Law Unit Director ordering HR department not to communicate with me to deny my request of transfer or *any* relief.
- Union refused to call a fair hearing on my behalf after my request, refused to provide *any* avenue for complaint, provide any remedy, closed my file and refused to communicate with me, once I filed current lawsuit.

In *Kotcher*, Court said that the plaintiff must prove that the employer "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." 957 F.2d at 63. I satisfied *Kotcher*, but Court failed to notice.

I should be afforded equal protections of the law. The panel's summary order would work a **manifest injustice,** if not reheard.

I declare under penalty of perjury that the foregoing is true and correct.

I therefore respectfully ask that this Court to review its decision and allow EN Bank review and rehearing.

Respectfully submitted,

05/13/10 /S/ Polina
Gertskis

PETITIONER'S PERTINENT EXCERPTS FROM

UNITED STATES DISTRICT COURT
SOUTHERN DISTICT OF NEW YORK
--X

ANSWER TO THE DEFENDANTS OPPOSITION TO PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

POLINA GERTSKIS,

Plaintiff,
07 Civ. 2235(TPG)(JCF)

v.

CITY OF NEW YORK DEPARTMENT
OF HEALTH & MENTAL HYGIENE,
PETER BACKMAN,
AMERICAN FEDERATION OF STATE,
COUNTY& MUNICIPAL EMPLOYEES,
AFL-CIO, DISTRICT COUNCIL 37("DC37")
& LOCAL 375, CIVIL SERVICE
TECHNICAL GUILD ("LOCAL 375")

Jury Trial Demanded
Defendants.
--X

ARGUMENT

A. Standard

For the reasons stated below, I believe that my proposed second amended complain state cognizable claims against the "Defendants".

It is obvious that I am not an attorney and I am trying to represent myself to my best abilities. I have no financial resources to hire an attorney to represent me, especially that "Defendants did their best to make sure that I cannot afford one.

I don't believe that I am acting unlawfully by presenting new claims of which I did not have knowledge or understanding previously. I am learning, while I am working on this complaint and following FRCP rules.

I would like to state that "City Defendants" attorney Ivan Mendez Jr. comments about "ghostwriting" of my pleadings and any other documents are groundless. He received numerous assurances in writing (see exhibit 3, attached), verbally and on the 03/06/08 deposition, where I stated under the oath, that I wrote them all myself. He should not be making baseless statements that I should not be permitted to benefit from this special solicitude. I did not hear a rule that I cannot consult an attorney for any reason, or loose my pro-se status.

B. Plaintiff's § 1985(3) Claim

I believe that I alleged all four elements of conspiracy to my best abilities. There can be no civil conspiracy, if there is no underlying claim, such us failure to stop the discriminatory and harassing behavior by public officials, who have all the power to stop the unlawful discrimination, which is extremely harmful to me.

(1) in the attached documents, I showed the conspiracy- meeting of the minds of two powerful officials, who are responsible to stop the unlawful discrimination, but not acting to do it
(2) for the purpose of depriving me directly of my civil service position in different agency.
(3) denying and condoning my discriminatory claims, after being fully aware of the Decision of Unemployment Insurance Appeal Board, where the judge found that I quit my job with a good cause under the law.
(4) I am injured professionally, morally, financially and deprived of the equal protection rights, guaranteed by the United States Constitution.
All of the above elements supported by the documents (see exhibit 2 section1, pg EEO 00167-00169, section 2 pg EEO 00159; attached) and providing basis and facts to my claims in my proposed second amended complaint.

C. Plaintiff's Claim Against Dorothy Wright

My § 1983 claims against D. Wright are not defective. I identified her personal involvement in the alleged deprivation of my constitutional rights. In paragraph 15(d-g) of the proposed second amended complaint I showed
(1) That she participated directly in the alleged constitutional violation.

In paragraph 15 (a-c, i) and 18 (d) of the proposed second amended complaint, I showed that (2) she failed to remedy the wrong after being informed of the violations.

In paragraph 15 (h) of the proposed second amended complaint, I showed that (3) she allowed the

continuance of such a discriminatory policy or practice.
In paragraph 15(e, f, i) and 18(d) of the proposed second amended complaint, I showed that (4) she exhibited deliberate indifference by failing to act on information indicating that unconstitutional acts were occurring.
"City Defendants" attorney Ivan Mendez, Jr. deliberately chose to be blind to my allegations against Ms Wright which amount to constitutional deprivations. They are all listed in the aforementioned paragraphs.

D. Plaintiff's "New" Retaliation Claims

In the attached charge of discrimination (see exhibit 2) you will see that my retaliation claims are going hand in hand with the race discrimination, fraudulent determination and investigative report, conspiracy and failure to transfer me.
I believe I showed that because I was filing Grievances with the Union, EEO discrimination claims, EEOC claims and a lawsuit, I have suffered and still suffering an adverse action and this action have an objective tangible affect.
All this claims are as new as could be and I am afforded a right to sue letter from DOJ to file a lawsuit based on them. As I stated previously, my claim would not be referred to DOJ if it was not valid, but would simply be dismissed.

CONCLUSION

WHEREFORE, Plaintiff respectfully request that the Court deny Defendants opposition to my motion to amend my amended complain, grand me a leave to amend my amended complaint and such other and further relief as it deems just and proper.

I declare under penalty of perjury that the foregoing is true and correct.

/S/
Polina Gertskis

Dated: March 18, 2008

PERTINENT EXCERPTS FROM
PROPOSED SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTICT OF NEW YORK
--X

POLINA GERTSKIS,

Plaintiff,

07 Civ. 2235(TPG)(JCF)

v.

CITY OF NEW YORK DEPARTMENT
OF HEALTH & MENTAL HYGIENE,
PETER BACKMAN, DOROTHY WRIGHT,
AMERICAN FEDERATION OF STATE,
COUNTY& MUNICIPAL EMPLOYEES,
AFL-CIO, DISTRICT COUNCIL 37("DC37")
& LOCAL 375, CIVIL SERVICE
TECHNICAL GUILD ("LOCAL 375")

Jury Trial Demanded
Defendants.
--X

1. This action is brought for discrimination in employment pursuant to:

a. Title VII of the Civil Rights Act of 1964, as codified, 42U.S.C. §§ 2000e to 2000e-17(amended in 1972, 1978 and by the Civil Rights Act of 1991. Pub,

l. No. 102-166) (Race, color, gender, religion, national origin);

b. New York Human Rights Law, N.Y. Executive Law § 296;

c. New York City Human Rights Law, N.Y.C. Administrative Code § 8-107; § 8-502;

d. 42 U.S.C. § 1983 ("Section 1983"), U.S.Constitution, Fourteenth Amendment, Equal Protection Clause;

e. The Civil Rights Act of 1866, 42 U.S.C.§1981("Section 1981") and

f. 42 U.S.C. §1985(3).

2. Jurisdiction is specifically conferred upon this United States District Court by the aforementioned statutes, as well as 28 U.S.C. §§ 1331, 1343. Jurisdiction may also be appropriate under 42 U.S.C. §§ 1981, 1983 and 1985(3), as amended by the Civil Rights Act of 1991, Pub. L. No, 102-166, and related claims under New York State and City Law.

7. The discriminatory conduct of which I complain in this action includes:
Failure to promote me;
Unequal terms and conditions of my employment;
Retaliation;
Sexual harassment;
Constructive Discharge;
Racial discrimination;
Wrongful termination;

Depravation of civil rights and equal protection rights.

8. It is my best recollection that some of the alleged discriminatory acts started on 04/19/94,

11. City defendants and specifically Deputy Assistant Commissioner Peter Backman discriminated against me based on my sex - female among other ways by:
o. Depriving me of my constitutional right to equal protection in violation of 42 U.S.C. - 1983;

12. My submission to Peter Backman's demands became a condition of my continued employment, since my requests for the Union and City EEO intervention were ignored;
I had to leave my job because the situation became intolerable and consider it a constructive discharge;

13. Defendants retaliated against me and continue to retaliate against me for engaging in protected activity during my employment.

14. City and Union defendants conspired to deprive me of equal privileges guaranteed by federal law and by the United States Constitution by ignoring my pleads for transfer in a deferent location, I was constructively discharged from job 18 month ago. Making fraudulent and harassing stories about me and intimidating me to return in the old working place or resign.

16. I contacted H.R. Director on numerous occasions without any success. Also applied on many positions

with the City, which were available and I was fully qualified for them, but was not offered a position in a different location. I had to file for unemployment insurance on 02/12/07 and after a hearing, judge found that I quit my job with good cause under the law. City did not appear on the hearing and did not appeal it. (Decision of Unemployment Insurance Appeal Board was included in Amended Complaint);

19. I have suffered substantial loss of earnings and other benefits of employment, also suffered morally and my health is deteriorating as a result of intentional discriminatory practices of City and Union Defendants;

WHEREFORE, Plaintiff prays that the Court grant such relief as may be appropriate and for such additional relief as justice may require including an offer for reinstatement in a different location with appropriate retroactive seniority, status and compensation, loss of wages with interest, injunctive orders, damages, costs, and attorney's fees and other benefits suffered by reason of City and Union Defendants failure and willful refusal to comply with the provisions of the law.

Dated: February 19, 2008 /S/ Polina Gertskis

PETITIONER'S PERTINENT EXCERPTS FROM **AFFIRMATION OF POLINA GERTSKIS IN SUPPORT OF PLAINTIFF'S MOTION FOR PROTECTIVE ORDER & ORDER TO SHOW CAUSE**

07 Civ. 2235(TPG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTICT OF NEW YORK
--X
POLINA GERTSKIS,
Plaintiff,
v.
CITY OF NEW YORK DEPARTMENT
OF HEALTH & MENTAL HYGIENE,
PETER BACKMAN,
AMERICAN FEDERATION OF STATE,
COUNTY& MUNICIPAL EMPLOYEES,
AFL-CIO, DISTRICT COUNCIL 37("DC37")
& LOCAL 375
Defendants.
--X

I, Polina Gertskis, **affirm under penalty of perjury that**:

1. I, Polina Gertskis, am the plaintiff pro-se in the above entitled action, and respectfully move this Court to issue an order to grant a protective order, an order to show cause

I certify that I attempted to confer in good faith with other affected parties in an effort to resolve the dispute without Court action on multiple occasions including but not limited to my letters to the Union on12/19/06 and to HR Director on 02/14/07 with request to resolve the dispute and provide me with a

transfer. During the course of almost 8 month of this action: On 09/ 20/07 in my e-mail to the defendants, I requested a conference for the settlement.
On 09/20/07 I requested from the Union officials to fulfill their promise to help me with the transfer. I wrote to them that I am now in a desperate situation and might ask the judge for the temporary or **preliminary relief.**

Under FRCP Rule 65(b) I file an order to show cause to enjoin defendant's discriminatory practices and order affirmative actions and to provide equitable relief which justice requires until a final disposition on the merits in above entitled action for the following:

(1) job placement, where I don't have to face a harasser, provided;
(2) discrimination and harassment stopped;
(3) violation of Civil Rights stopped;
(4) violation of Constitutional Rights stopped;

Unless this order is issued, I will suffer immediate and irreparable injury. I already suffer injury to my professional standing. I got health problems such as insomnia, depression, loss of enjoyment of life, stomach disorders. I suffer loss of my income for over a year and unable to get another job. My husband's income, which was supporting my family until now could seize soon, since he received a note that Cabrini Hospital, where he works closing in 60 days and there will be massive layoffs. As can be seen from the foregoing, I have no other adequate remedy at law. No prior request has been made for the relief requested herein.

WHEREFORE, for all those reasons as well as all reasons in plaintiff's affirmation for motion for summary judgment and the accompanying exhibits in support of this motion, plaintiff respectfully request that the Court grant the within motions, as well as such other and further relief as may be just and proper.

Dated: New York, New York November 07, 2007

/S/

THE CITY OF NEW YORK
OFFICE OF ADMINISTRATIVE
TRIALS AND HEARINGS

PRESENT: JOAN SALZMAN
Administrative Law Judge

Index No.
10-1938

In the matter of:
DEPARTMENT OF HEALTH AND
MENTAL HYGIENE,

Petitioner,
-against-

POLINA GERTSKIS,
Respondent.

July 2, 2010

Office of Administrative Trials and Hearings
40 Rector Street
New York, New York 10006

ALJ SALZMAN: Okay, thank you. Now, it's your turn to give me the opening. But, I'll ask you to summarize. You don't need to give me all the details. You may decide to testify later if you wish to. But, what would you seek to prove today?

MS. GERTSKIS: Okay, since Ms. Tessler already pointed out that all the discrimination is out of the question, there is really hard to prove that I was discriminated, But, what I'm trying to prove here now that I contacted Ms. Tessler directly. I contacted HR office. I contacted EEO office. I contacted the union with my request to be transferred to a different agency. Not only I contacted verbally; I contacted them continuously, bombarding them with the emails and requesting that I'm in a desperate position, and I need job to support my family. All of my requests were totally ignored.

Now, all these document is here, and they speak for themselves, Not only I contacted them, I requested HR Department to change reason for my leave of absence, and I explained that I went out of there because I could not tolerate the sexual harassment any more. And my main reason to leave that place was sexual harassment. Therefore, I'm asking to be transferred out of that place.

Now, there are documents that union was actively trying to find a place for me. There are documents here that Ms. Tessler told in email to H R office not to communicate with me because this is a law—this is something that concerns a lawsuit, and therefore, Mr. Mendez who is a lawyer for the City, is the one to be contacted. Now, I was contacting Mr. Mendez on a daily basis, many times, and was requesting him to allow me to be transferred somewhere. So, he wrote down to me that I am allowed to return back to place where I worked or resign, or otherwise he also wrote down that he is looking for places for me. Now, union was also writing down that they're looking for places for me.

Now I have document here, proving that I found the very same position in Department of Environmental protection, which I presented with the number to the union, to Mr. Mendez, absolutely equal position to which I'm fully qualified, and I requested transfer to that position. And I did not get any answers besides union sending me a letter that it was forwarded to the lawyers. Now, I filed about 75 positions with the City, filed for the position to which I'm fully qualified. Maybe some of them, I would need some training, but my Master degree in Chemistry and my experience of over 20 years would have allowed me to reinvent myself in different place. But, I was not allowed anything. On top of that, there is a document here that's stating that one of the positions that I have applied to was actually in process approval, position from 2/12/08, which was, uh, public health epidemiologist II. It state that it was in process and approval. I contacted Mr. Mendez about this position. He failed to reply to me about it. So, my multiple requests to be transferred was totally ignored and I was not allowed any hearing, which was supposed to happen not when everything is adjudicated so Ms. Tessler can say there is no discrimination because such judge as a Griesa was presiding on this case. (TRIAL PAGES 45-47)

ALJ SALZMAN: And now I know that you've submitted and – now, the other principle that goes with that is that those decisions of the federal courts, the southern district court of the United States and the 2nd Circuit Court of Appeals are still binding on me as the judge here. I can't upturn that. I'm stuck with it. I have it, and I have to follow it. That's the rule of law.

MS. GERTSKIS: Isn't that I'm supposed to get a fair hearing?

ALJ SALZMAN: Well--

MS. GERTSKIS: (Interposing] What is a fair hearing?

ALJ SALZMAN:-- a fair hearing includes principles of res- judicata that we can't do it over. We're not allowed to do it over.

MS. GERTSKIS: And when was my fair hearing was supposed to be done?

ALJ SALZMAN: Well—

MS. GERTSKIS: Four years after I was thow [sic] out?

ALJ SALZMAN: -- your claims were considered by higher courts than this one.

MS. GERTSKIS: No, no, no. I'm asking about here, here.

ALJ SALZMAN: I don't want to argue with you. I'm delivering my ruling now.(TRIAL PAGES 58-59)

MS. GERTSKIS: There is equal employment opportunity policy here, where I took few pages from it, and it's stating that agency EEO officer will transfer the matter to the agency general counsel once the person complaint is filed outside. And this general counsel will be responsible for any further handling of the matter. I would like to state that this was never done to me, which is violation of policy of the City. There is investigation process, which is EEO 212. This investigation process begins immediately after the EEO officer or counsel receive either an oral or written complain of discrimination. You would see that I file my complaint on November 11th , no, on November 8th, 2005? Five, I guess? Six, I'm sorry. And investigation, so-called investigation , which was done in one day, on April 11 when everyone was interrogated and given their denial, was done five months later after I filed my lawsuit, one month after I filed my lawsuit. So, this is investigation process is violating of the City policy, the way it started, the way how it went, and the way how it was filed and how it was logged, how it was -- I received all these paperwork of the investigation from EEO , who actually only investigating my mental status, and stating that all the respondents are worried about other people and they requesting not to allow me to come in any capacity, which is very openly a retaliatory statement.

She didn't find it at all retaliatory. Now, about confidential written report, it should be issued within 30 days of the date the discrimination complaint was filed, unless the time period is extended by mutual agreement of EEO officer and the complainant. This EEO 218. So, in my situation, the EEO complaint, the EEO investigation written report was giving me, during the discovery, and the conclusion of the EEO of her findings and was given on July 9, 2007. This is when I was supposed to return to my job, which she found unsubstantiated. This is from July '06, from November '06to July '07, I didn't hear form Ms. Wright about her conclusions. She could not make up her mind from denial of the respondents what was their actual investigation result. She did not allow me to come to evaluate my case. She did not allow me to present any more documents. She did not allow me to speak to her. She refused totally to allow me to really look at my case and see what is actually doing with this case. What happened here? This is total violation of the policy, not besides that she didn't transfer my case to general counsel who was supposed to take care of my case. And where is the union here? Union was totally out of reach... They are not there for me when I was there paying my union dues, I was a member. As soon as I am in trouble, and I'm requesting please help me, there is no one there. There is no one asking for fair hearing; there is no one looking why she lost her job and asking City to change the documents, that this is not the real reason why I left, and I pointed out to them that I could not say to harasser's face I'm leaving because I want out of here because you harassing me.(TR. PAGES72-75)

MS. GERTSKIS: ...one more thing. Interim relief.

ALJ SALZMAN: Interim relief—you're reading form the EEO?

MS. GERTSKIS: Yes, it's from page EEO 222. When the EEO officer believes that harm will be sustained by one of the parties, if relief is not granted pending resolution of the charge of discrimination, she may take such necessary and appropriate actions that are within his/ her authority to ensure that no one is harmed. And this is was actually against the policy what was done to me.

ALJ SALZMAN: Okay. Thank you for the closing. (Trial page 76)

MS. TESSLER: -- so the point is, she submitted – she asked for a leave of absence, she got the leave of absence, she knew she wasn't coming back, nobody ever stopped her from coming back to work when that leave of absence was up. She could've presented herself at the doorstep on that day, but yet she did not do so. And it's the agency's position that she is AWOL, and she's been AWOL since that date. (Trial page 74)

ALJ SALZMAN: All right, so what do you want in terms of an outcome?

MS. TESSLER: Well, since she has made it very clear that she's not interested in coming back to the agency, we're requesting that she be terminated. (Trial page 78)

MS. GERTSKIS: I heard that Ms. Tessler said that I'm not asking for relief. I do ask them for relief because I said that I'm working for a private company doesn't mean that I decided to lose my 13 years of life because someone decided to throw me out because I filed discrimination complaint and retaliated of me because I want justice in my case. I do want to come back in the City, in the position to which I'm qualified and where I'm treated as a normal human being with all the human rights that are allowed to me by law. And this can be negotiated together with the City and me.

ALJ SALZMAN: I'm not part of any kind of negotiation.

MS. GERTSKIS: I understand.

ALJ SALZMAN: I have to rule on the issues before me.

MS. GERTSKIS: I'm saying that I'm asking for relief because there was no relief in my situation, and I have no, never chance to open my mouth. Even she asking to firing me.

ALJ SALZMAN: I want you to understand that the only charge properly before me is the charge that you were not reporting to work from July of '07 to the present.

MS. GERTSKIS: And I believe that this is unlawful charge.

ALJ SALZMAN: And I cannot grant a transfer or a negotiation. This is not a negotiation.

MS. GERTSKIS: I understand, I understand that this charge was really unlawful, unconstitutional because I was never given chance to return, and why they are now telling me that I'm disciplined for it. There is no sense in the whole situation.

ALJ SALZMAN: All right, well I'll consider everything that everybody said to me today, and I'll write a decision.

(TRIAL PAGES 83-84)

Dep't of Health & Mental Hygiene v. Gertskis
OATH Index No. 1938/10 (July 30, 2010)
Undisputed evidence established that respondent was continuously absent without leave from July 9, 2007 to the present. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HEALTH AND MENTAL HYGIENE
Petitioner
-against-
POLINA GERTSKIS
Respondent

REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Administrative Law Judge*
This is a disciplinary proceeding referred by the petitioner, the New York City Department of Health and Mental Hygiene (the "Department"), pursuant to section 75 of the
Civil Service Law. Respondent Polina Gertskis, an assistant chemist in the Department's Public Health Laboratory, is charged with being absent without authorization (AWOL) from July 9, 2007 to the present (Pet. Ex. 6).

A hearing was conducted before me on July 2, 2010. The record was closed on July 9, 2010, upon receipt of information I requested from the parties.

PRELIMINARY MATTERS

There is a long pre-trial procedural history to this matter, all of which is documented in four volumes of transcripts dated May 4, May 26, June 15 and July 2, 2010, in Petitioner's Exhibits 1-6, and in respondent's voluminous exhibits and emails contained in Respondent's Exhibits A-D and ALJ Exhibits 1-7. That history is all a matter of record and can be summarized as follows.

Adjournment Granted to Respondent to Retain Counsel

Respondent failed to appear for the initial settlement conference scheduled for March 18 2010, then appeared *pro se* for the originally scheduled trial date on May 4, 2010. She was notified repeatedly by this tribunal, both verbally and in writing, of her right to appear and defend the charge against her with counsel or any other representative of her choice. Because there had been no settlement conference in the matter and respondent was unrepresented here, that trial date was converted into a settlement conference before Hon. John B. Spooner of the Office of Administrative Trials and Hearings (OATH). The matter did not settle. Judge Spooner adjourned the trial so that respondent could find an attorney, and he set a pre-trial schedule, both on the record and in an email dated May 4, 2010 (Tr. May 4, 2010; ALJ Ex. 1). Despite the urging of the settlement judge and the trial judge that respondent consult counsel, respondent wrote back on May 5, 2010, in an email, stating, "I spoke to the attorney yesterday and realized that no one would work any miracle for me any more than I could do for myself, therefore there would be no attorney representing me" (ALJ Ex. 1). Thus, respondent elected to proceed without an attorney and confirmed that decision on numerous occasions before the hearing and again at the subsequent hearing.

Almost immediately after her May 4th appearance at the settlement conference, respondent began sending emails to me as the trial judge, to the settlement conference judge, to OATH's Calendar Unit, and to her adversary, declaring that -- even though none of the parties had yet appeared before me -- declaring that the trial in this matter would be a sham and that she could not get a fair trial. Respondent claimed in emails of May 18 and 21, 2010 (ALJ Ex. 1) that in order to have a fair trial, she would need 14 witnesses and voluminous documents from the Department. The Department counter-argued that the evidence respondent sought was burdensome, irrelevant, and otherwise barred by previous adjudications of the federal courts, which, the agency argued, had already disposed of respondent's claims that she was the victim of discrimination, retaliation, and unfair and illegal conduct by her employer as well as by her union. Respondent complained repeatedly that she would not get a fair trial and announced that, therefore, she refused to appear for, or, by turns, wanted a delay of, the trial (ALJ Ex. 1).

Pre-Hearing Efforts to Address the Scope of the Hearing

The schedule set originally by Judge Spooner included a telephone conference call on a date to be set by me, so that I could get a sense of the scope of the hearing, given that respondent was requesting multiple witnesses and there appeared to be federal case law governing this case (ALJ Ex. 1). However, it became clear to me from respondent's prolific emails, in which she ascribed improper motives to all involved,[1] that an off-the-record telephone conference would not be the most effective way of handling these important pre-trial matters. Respondent was writing emails that indicated her extreme distrust of the courts, of her agency and of her union, and of any entity that did not uphold her battery of complaints or effect for her a transfer to a different City job. She was refusing to accept my written rulings about the schedule and preliminary matters (ALJ Ex. 1). To have the issue of the scope of the trial relegated to an off the- record telephone conference with the parties would only have compounded the confusion already being generated by her combative email traffic. Accordingly, I emailed the parties on May 21, 2010, and modified the schedule. In particular, I cancelled the telephone conference and converted it into an in-person, on-the-record pre-trial conference, to be held at OATH on May 26, 2010, for the purpose of hearing an offer of proof from respondent on the record as to the relevance of the testimony she proposed to offer and of the documents respondent said in her emails she needed from the Department, in light of the federal court decisions cited by the Department. Respondent then refused to accept the scheduling order and expressed her point of view via email that she had somehow been deprived of an imagined right to present her arguments only via a telephone conference. She seized upon that substitution of an in-person conference on the record at the tribunal as a deprivation of some supposed right to a phone call (ALJ Ex. 1).

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1 At the time of the hearing in this matter, respondent vented her frustration and directed her ire at the federal courts as well. She even went so far at the hearing here as to level scurrilous personal attacks on a federal judge who had ruled against her, calling him a "monster" and adding gratuitously, "He's probably harassing people himself" (Tr.59). It appears that any person who disagrees with respondent's view of her case becomes the subject of her repetitive, meritless, and rambling complaints.

Despite Repeated Delays and Deliberate Defaults by Respondent, the Tribunal Provided Multiple Explanations to Respondent of the Hearing Process and of Respondent's Right to Counsel, and Granted Her Numerous Opportunities in Successive Pre-trial Orders to Appear and to Enable Her to Participate in Her Defense

I responded to respondent's emails and explained the procedures of the tribunal, assuring her that no decision had been made in her case, and directing her to appear and defend herself. I reminded her at every turn of her right to appear with benefit of counsel or a representative of her choice (Email May 21, 2010, ALJ Ex. 1). I set up the schedule so that respondent would have a full opportunity to present her evidence on a future hearing date. I granted to respondent the additional time she requested to prepare her case and the opportunity to apply for subpoenas if necessary. I explained the pre-trial process, instructing respondent about how to make an offer of proof about her proposed witnesses and documents. Taking into account the convenience of potential witnesses, I did not require their appearance on May 26th. Rather, I ruled that the hearing would commence on a date to be set after the May 26th conference, so that respondent could return with her witnesses, if permitted as necessary to her defense and not precluded by prior adjudications (ALJ Ex. 1). Still distrustful of the process, respondent deliberately failed to appear on the first scheduled pre-trial conference date I set, May 26, 2010 (Tr. May 26, 2010). The Department's attorneys appeared on May 26th for the preliminary conference in respondent's absence. I issued a letter ruling on May 26th, confirming my rulings on the record, stating that because respondent had refused to appear, I had been unable to make the necessary evidentiary rulings (ALJ Ex. 2). In the ruling, I explained the trial procedures to respondent again, including opening statements, direct and cross-examination of witnesses, documentary proofs, and closing statements. I ruled further that because respondent was unrepresented, I was ordering the schedule extended again for the same type of two-step proceeding: A pre-trial conference and a built-in second hearing date to be set should respondent demonstrate that her evidence was relevant and necessary. I set Tuesday, June 15, 2010, for the next pre-trial, on-the record conference and the commencement of the hearing.

This time, respondent sent me an adjournment request on June 11, 2010, at 5:10 p.m. on the Friday preceding the conference date, citing her need for a fair hearing as the basis for the adjournment (ALJ Ex. 2). I emailed both sides that night, saying that I needed to hear from the Department as to the adjournment by noon the following Monday, June 14, 2010, reminding the parties that I had already built in a possible continuance date for respondent's benefit so that she could have a full and fair opportunity to be heard, and directing that they should not cease preparations for the hearing (ALJ Ex. 2). I directed that pending my decision on the adjournment request, they should continue to prepare; that respondent should be ready to present her offer of proof and both sides should be ready for trial as scheduled on June 15th, with a second date to be set if needed. In the meantime, respondent stated that she wanted to submit her documents and queried why the documents were not enough, so that her appearance could be obviated. She proceeded over the weekend to send to me and to the Department 24 emails with 69 attachments, all of which I have included in the record (Resp. Ex. A). That Monday, June 14th, I heard from the Department, which voiced no objection to an adjournment. But neither party showed good cause for an adjournment, given that respondent was to have her opportunity to be heard and that a continuance would be granted so that she would have time to serve subpoenas on the witnesses and gather documents from the Department should that process be found necessary. Therefore, I denied the adjournment on June 14th in the afternoon, and ordered the parties to appear as previously ordered. Only after her adjournment had been denied, respondent then sent an email at 11:34 p.m. on June 14th, the eve of trial, stating that she was not feeling well (ALJ Ex. 4). I opened and reviewed that email on the morning of trial, June 15th. Again the Department appeared for the hearing, but respondent did not. I treated respondent's late-starting excuse as I would any other, similar claim of illness, and declined to proceed in respondent's absence (Tr. June 15, 2010).

Instead, I granted an adjournment for respondent and issued orders that the matter was adjourned on the condition that respondent appear at the next-scheduled hearing date and present a good and sufficient medical note from a doctor specifically indicating how her claimed illness prevented her from appearing for her hearing. Again, I re-set the schedule for respondent's benefit (ALJ Ex. 5). I issued another letter ruling, again explaining the process to respondent, reminding her of her right to appear with representation, and re-setting the schedule for the hearing to commence on July 2, 2010, again setting up a built-in continuance of the hearing for respondent if appropriate. Throughout these protracted pre-trial proceedings, I reiterated in my emails and orders to respondent that I had not made any decision on the merits and restated the commitment of this tribunal to due process of law (ALJ Ex. 6). Respondent wrote on June 14th, in her 11:34 p.m. email, "I am sick, for few days already" (ALJ Ex. 4). I noted in my June 15th letter ruling that although respondent had sent 24 emails with 69 attachments to me and to Department counsel, beginning on Friday, June 11, 2010, at 5:10 p.m. and continuing to about 12:30 p.m. on Saturday, June 12, 2010, in none of those voluminous emails did she mention that she was ill (ALJ Ex. 5). In my June 15th letter ruling, I stated that the record of a documented history of respondent's deliberate refusal to appear for mandatory proceedings caused me to make the adjournment final. I wrote that respondent's conduct of record suggested that she might be delaying the hearing purposefully without a legitimate reason and that she must appear on the next ordered trial date with good and sufficient medical documentation of the reasons for her failure to appear on June 15th at OATH (ALJ Ex. 5).[2] I stated in the June 15th letter ruling that on multiple occasions since this case had been filed at OATH, in emails to me and to agency counsel, and going back much earlier, as long as a year ago, during the internal pre-hearing process within the Department preliminary to the matter formally commenced here, respondent had declared in writing that she refused to participate in this disciplinary proceeding (ALJ Ex. 5). But she appeared to cast blame for this on others and to invite a process from which she could say she was excluded. In fact, she was included and required to attend her hearing. Respondent repeatedly and purposefully refused to appear for her hearing here, despite written notices received by her from this tribunal that her attendance was mandatory. The particulars of her refusals and avoidance of closure in this case are documented and quoted in my June 15, 2010 letter ruling (ALJ Exs. 1, 2, 4-6; Resp. Ex. A).

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2 Respondent did present a medical note when she appeared for the hearing on July 2, 2010 (Resp. Ex. D). The doctor's note was not contemporaneous with a doctor's appointment on June 15th. Rather, the note was dated July 1, 2010, two and-a-half weeks after the June 15th hearing date that respondent missed. Respondent had announced in her email of June 14, 2010, that she was taking "official sick leave" from her other job "tomorrow and heading to the doctor" on June 15th. She provided his phone number and said she "would gladly provide" a note from the doctor (ALJ Ex. 4). Respondent did not obtain the doctor's note on June 15th. The July 1st note, written on a prescription slip, stated that the doctor had seen respondent on June 15th, that she had

been ill that day, and that he had prescribed medication for her. On this record, in the absence of any additional information concerning the medical note, I make no finding as to the *bona fides* of that note. I can and do find that respondent timely submitted the note on July 2, 2010.

Respondent asserted in writing with some ambivalence that she would not participate in this case, citing her belief that she could not get a fair trial and her misconceptions about the law, including her mistaken argument that previous federal court decisions concerning her City employment should not be considered binding against her (ALJ Exs. 1, 2, 6). She claimed erroneously that if a tribunal considered those decisions binding, it would betray some type of unfair prejudice against her. To the contrary, to take cognizance of binding legal precedent is not a sign of bias; it is to follow the mandates of the law. Because she is *pro se* and needed the additional protections afforded unrepresented parties,[3] and because she seemed to misapprehendthe law, I gave respondent yet additional opportunities to appear, with counsel if she chose to secure the services of an attorney, and defend herself (ALJ Exs. 1, 2, 4-6).
I noted in the June 15th letter ruling that there would be closure in this matter and that it would not be delayed indefinitely (ALJ Ex. 5). Again, I reiterated that I was creating a schedule that would provide her with a full opportunity to be heard and declined to proceed in her absence, noting again that she was unrepresented.

Motions by Respondent to Make Her Own Recording of the On-the-Record Proceedings and to Disqualify the Trial Judge and all OATH Judges

During the pre-trial phase, I denied successive, repetitive motions by respondent (A) to make her own tape recording of the proceedings as contrary to accepted practice (ALJ Ex. 1), and (B) to disqualify me and, later, all the judges of this tribunal, because these applications were utterly lacking in merit (ALJ Exs. 2, 6).

Evidentiary Rulings

Finally, on July 2, 2010, respondent appeared for her hearing, accompanied by her husband, and the hearing went forward (Tr. July 2, 2010). Again, she stated that she understood her right to have counsel and confirmed that she nonetheless preferred to proceed without benefit of counsel or any other representative (Tr. 5-6). At the hearing, as I began to explain how she could go about making her offer of proof, respondent asked, "Why am I here?" (Tr. 8). I explained that she was at this tribunal to have her hearing and that in any similar case, with issues of prior adjudications, or in any case in which 14 witnesses were said to be needed, I would ordinarily ask for an offer of proof of what, in summary, each witness would say before I required the appearance of those witnesses (Tr. 8-9, 49). I stated that I would make a judgment that morning as to whether we were going to come back another day and listen to those witnesses.

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3 *See, e.g.*, Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York, 48 RCNY Appendix A, § 103(A)(8) (Lexis 2010).

The Department submitted a 2006 decision by the New York City Office of Collective Bargaining (OCB) dismissing respondent's complaints against the City for allegedly interfering with her right to file a grievance and against the union for allegedly colluding with the City and breaching its duty of fair representation (Pet. Ex. 4). Ms. Gertskis participated in the OCB proceeding, in which OCB rejected Ms. Gertskis's claim that the union failed to obtain the same documents she sought in this proceeding (Tr. 36-37). I held the record open until July 9, 2010, and instructed the parties that I would accept one additional email from each side, a submission from the Department on July 6, and a response to that email from respondent on July 9th, limited in each instance to the question of what the process was before OCB, so that I might consider whether that decision had any binding effect here. Both sides filed emails in response and indicated that they both participated in that proceeding (ALJ Ex. 7).[4] Throughout these proceedings, respondent has barraged the Department and me with excessive email communications, taking issue with every aspect of the process and giving vent to her views about her employment.[5] Respondent's emails have been disjointed and off-point. She continued to send them even when instructed to stop and reserve her points for a limited period of two days, and present them at the next scheduled appearance at the tribunal (ALJ Ex. 1). In order to have closure of the record, and to stop the continuing and deliberate production of

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4 I have included in the record all the emails from the parties after July 2, 2010, including my email rulings of July 6, 2010, as ALJ Exhibit 7.

5 During the trial, Ms. Gertskis herself described her method of emailing during the time she was filing her discrimination complaints: ". . . I contacted Ms. Tessler directly. I contacted HR office. I contacted EEO office. I contacted the union with my request to be transferred to a different agency. Not only I contacted verbally; I contacted them continuously, *bombarding them with the emails* and requesting that I'm in desperate position, and I need job to support my family" (Tr. 57) (emphasis supplied).

vexatious emails from respondent, who repeatedly and deliberately violated orders and instructions of this tribunal (ALJ Ex. 1), I also ordered on July 2, 2010, that there were to be no further submissions without specific permission from me. I ruled that emails sent after July 9th would be disregarded (Tr. 81). Despite these specific instructions, respondent continued to send emails to me on other subjects in violation of my orders. On July 6, 2010, she sent another extraneous email, without permission and in violation of my orders (ALJ Ex. 7). In this email, respondent complained about the July 2nd hearing. Because respondent did not seem to accept any direction from the tribunal, and had misconstrued and misrepresented in her email the events of her July 2nd hearing, and because she was still unrepresented, I took the opportunity to repeat and explain my orders on July 6, 2010. I explained in my email of July 6, 2010, the *res judicata* principles I had cited at the hearing, notified respondent in response to her requests for the record that her transcripts and audio recordings of the proceedings (except for the July 2nd date, which was being transcribed) were available to her for pick-up, corrected her wild allegations about the hearing itself, and reiterated my order that the record would close on July 9th and that emails after that date would be disregarded (ALJ Ex. 7).

When respondent did not immediately pick up the volumes of the record that were ready, and it appeared that she was awaiting the final volume before coming to retrieve the record, I decided that for the convenience of both parties, I would mail the full record to both sides via certified mail with this decision and she was so notified via email (ALJ Ex. 7). The final volume of the transcript and the audio CD recording of the hearing of July 2, 2010, together with all the preceding transcripts and audio CD recordings are being mailed to both sides via certified mail with this Report and Recommendation. To the extent that respondent is requesting additional documents since the trial, I hereby deny that request as irrelevant and barred by *res judicata*. To the extent that respondent is now asking whether she should "involve an attorney to represent" her "exclusively in resolving [her] transfer" to a job in another City agency (Email from P. Gertskis, July 14, 2010, ALJ Ex. 7), I can only reiterate what I said on the record of the July 2, 2010 hearing: The adjudication in this matter is not a negotiation and I cannot grant respondent a transfer to another job (Tr. 82-84).

The permitted pleadings and the law applicable here do not authorize such affirmative relief for respondent. The sole issue before me is whether respondent was AWOL for three years from her position as assistant chemist at the Department of Health and Mental Hygiene (Tr. 83-84).

Although a conference judge attempted to facilitate a settlement, the parties were unable to settle this matter. As the trial judge, I am not privy to any of the settlement offers or discussions, which form no part of this Report and Recommendation. Accordingly, no transfer to another job is available in this proceeding, which is limited to the findings contemplated by section 75 of the Civil Service Law. Thus, respondent must do as she is best advised in connection with any application she may have for City jobs other than the one at issue here. Transfer to another job is not an issue to be addressed in this proceeding.

Prior Federal Court Decisions

At the core of the evidentiary rulings in this matter are three prior decisions of the federal courts. *See Gertskis v. New York City Dep't of Health and Mental Hygiene, et al.*, Slip Op., 07 Civ. 2235 (TPG), 2008 U.S. Dist. LEXIS 75288 (S.D.N.Y. Sept. 29, 2008) (decision denying motion to amend); *later decision*, Slip Op., 2009 U.S. Dist. LEXIS 25244 (S.D.N.Y. Mar. 26, 2009) (dismissal of Ms. Gertskis's claims on the merits), *aff'd*, Slip Op., 09-2458-cv, 2010 U.S. App. LEXIS 8975 (2d Cir. Apr. 30, 2010) (Pet. Exs. 1-3). In the first cited decision, the United States District Court for the Southern District of New York denied Ms. Gertskis's motion for leave to file a second amended complaint. Thereafter, in a detailed and lengthy decision, the Court then painstakingly reviewed each of the issues and claims raised by Ms. Gertskis and granted summary judgment to the City defendants (the Department, Ms. Gertskis's supervisor, and her union), dismissing her complaints. In that federal court action, Ms. Gertskis had claimed that the City defendants discriminated against her on the basis of her gender, sex, religion, and national origin, that they had sexually harassed her and retaliated against her for filing complaints of discrimination, and that the union breached its duty of fair representation. The Second Circuit affirmed that decision in *Gertskis v. New York City Dep't of Health and Mental Hygiene, et al.*, Slip Op., 09-2458-cv, 2010 U.S. App. LEXIS 8975 (2d Cir. Apr. 30, 2010). She raised the very same issues as a defense to the AWOL charges here, and added an improper cross-petition for affirmative relief from the Department and from her union (ALJ Ex. 2). The rules of this tribunal permit no such counterclaims and I recommend that those claims be dismissed as improper and as barred under well established principles of issue and claim preclusion.

Issue Preclusion and Claim Preclusion

The federal court decisions are binding on this tribunal. *See, e.g., Krepps v. Reiner*, Slip Op., No. 09-1617-cv, 2010 U.S. App. LEXIS 9866, at *2-*3 (2d Cir. May 14, 2010) (noting that *res judicata* refers to both claim preclusion, which bars successive litigation of the very same claim, and issue preclusion, which "'bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim. . . .' Together, these doctrines 'protect against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the

possibility of inconsistent decisions.'" (citations omitted);
Adrian Shipholding Inc. v. Lawndale Group SA, Slip Op., 600885/10, N.Y.L.J. (Sup. Ct. N. Y. Co. June 25, 2010) (state court was not free to rule differently from federal court on identical issue previously decided by federal court). Respondent concedes that the issues are the same here as they were in federal court, as she herself has written: "The DOHMH's/Union's disciplinary proceeding involves many of the same issues raised in my employment discrimination action and pending appeal" (Email from P. Gertskis to R. Tessler, Feb. 25, 2010, included in Resp. Ex. A). As noted, after receiving my successive pre-trial rulings directing her to appear and make an offer of proof on the record, respondent finally did appear for her hearing on July 2, 2010. At the hearing, I accepted into the record all the documents respondent offered (Resp. Exs. A-D; ALJ Exs. 1-6), and stated that I would review them, and that if there was material in those documents that required another hearing date to be set, I would notify the parties. If, however, there was no issue not already adjudicated in the federal courts, I would close the hearing on July 2, 2010 (Tr. 7-9, 19-20, 27-28, 43, 47-51, 61-62). I explained again in person to Ms. Gertskis what I had said in writing to her in my letter rulings: that she should explain on the record who each of her fourteen witnesses is, and describe the substance of the testimony they would deliver if permitted to appear. Respondent then explained the substance of the testimony expected from each of the witnesses she wished to call. One of the 14 witnesses reportedly is dead. I listened to respondent's offer of

proof on the record and heard the Department's objection to that offer.

The Department contended that the testimony respondent tendered and the documents she sought to have produced by the Department were irrelevant and barred as a matter of law based on collateral estoppel principles. I sustained the Department's valid objection and determined in a bench ruling that the testimony proffered was identical in substance to the matters respondent had previously litigated and lost in federal court and, therefore, denied respondent's request to have the same issues already put to rest by the federal courts reheard in this tribunal (Tr. 57-62).

I explained to respondent that the law bars the relitigation in multiple lawsuits of issues and claims that have already been resolved by a valid court determination. I explained further that the prior decisions of the federal courts, (Pet. Exs. 1-3), are binding on this tribunal and that, as a matter of law, I was not free to rehear the same issues (Tr. 47-51, 57-62).

Respondent submitted a copy of what appears to be a petition dated May 13, 2010, for *en banc* review of her case by the Second Circuit Court of Appeals. I added in my bench ruling that the binding effect of the existing rulings is unchanged at this juncture, even though respondent may have moved in the Second Circuit for reconsideration of the Court of Appeals decision *en banc* (ALJ Ex. 1). As of the July 2nd hearing, neither side knew of any new decision of the courts affecting the valid decisions of the federal courts submitted as Petitioner's Exhibits 1-3, and electronic research has revealed no reported decision on the purported *en banc* application respondent emailed to this tribunal (Tr. 50). There being no indication that Ms. Gertskis's purported petition for *en banc* review has been granted, the three reported decisions in her federal case stand. Assuming that respondent's application was properly filed, and some form of application for further appellate review is pending before the U.S. Court of Appeals, "the pendency of an appeal does not affect the use of an order or judgment as an estoppel." *In re Capoccia*, 272 A.D.2d 838, 847 (3rd Dep't 2000); 2-25 Weinstein, Korn & Miller, *CPLR Manual* § 25.04(a) n. 4 (Lexis 2010). Moreover, respondent's motion to stay City administrative proceedings pending her appeal in the federal courts was denied by the United States Court of Appeals for the Second Circuit. *Gertskis*, Slip Op., 09-2458-cv, 2010 U.S. APP. LEXIS 8975 (2d Cir. 2010).

I noted that respondent was aware of the legal principle of *res judicata* "on some level," because she herself had cited case law concerning it in her petition for *en banc* review in the Second Circuit (Tr. 47-48; ALJ Ex. 1; Resp. Ex. A). However, in those papers (Resp. Ex. A), respondent was citing cases and authorities concerning *res judicata* for the proposition, overruled by statute since 1987, that an Unemployment Insurance Appeal Board decision has collateral estoppel effect in a subsequent disciplinary hearing. Respondent won an Unemployment Insurance Appeal Board decision on April 30, 2007, in an uncontested matter in the New York State Department of Labor (Resp. Ex. A). Without participation by the Department, the ALJ found that respondent "quit her job" with good cause (Resp. Ex. A). In other words, the Department did not oppose respondent's application for unemployment benefits. The administrative law judge in that matter had only respondent's evidence before her.

As a matter of statute, summary unemployment insurance decisions are not accorded preclusive effect outside the context of the unemployment appeals. Labor Law § 623(2) (Lexis 2010) ("No finding of fact or law contained in a decision rendered pursuant to this article by a referee, the appeal board or a court shall preclude the litigation of any issue of fact or law in any subsequent action or proceeding" except in the unemployment insurance context); *Wooten v. New York City Dep't of Gen. Servs.*, 207 A.D.2d 754 (1st Dep't 1994), *appeal denied*, 84 N.Y.2d 813 (1995) (determination of Unemployment Insurance Appeal Board that petitioner was terminated in retaliation for filing complaint was without preclusive effect in Article 78 proceedings challenging determinations of Division of Human Rights, which dismissed, for lack of probable cause, petitioner's discrimination and retaliation complaints); *Strong v. New York City Dep't of Education*, 62 A.D.3d 592 (1st Dep't 2009), *appeal denied*, __ N.Y.3d __, 898 N.Y.S.2d 100 (2010) (Unemployment Insurance Appeal Board finding lacks preclusive effect in disciplinary proceedings); *Davidson v. Dep't of Correction*, OATH Index No. 545/95 at 5 (Feb. 7, 1995) (unemployment insurance determinations are generally not given collateral estoppel effect in disciplinary proceedings). *See also Panek v. City of Syracuse*, Slip Op., No. 86-CV- 514, 1989 U.S. Dist. LEXIS 249 at *11 (N.D.N.Y. Jan. 13, 1989) (noting that Labor Law section 623(2) limits the preclusive effect of the decisions of the Department of Labor rendered after July 7, 1987, under the Unemployment Insurance Law, three years after the decision in *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494 (1984)).[6]

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[6] Respondent cited *Ryan* in her papers that purport to be an application for *en banc* review by the Second Circuit (Resp. Ex. A). Labor Law section 623 legislatively overruled *Ryan* with respect to unemployment insurance determinations, but *Ryan* otherwise remains good law. 2-25 Weinstein, Korn & Miller, *CPLR Manual* § 25.04(h)(3) nn. 68, 69 (Lexis 2010).

At the hearing, I also found that respondent's request for documents from the Department was barred by the federal court decisions, and it became clear that respondent was raising the identical issues she had litigated and lost in the federal court, after having been given a full and fair opportunity to be heard in those higher courts (Tr. 61-62).[7]

Having taken the opportunity after the close of the hearing to review all the documents respondent placed on the record, I now find that an additional hearing session is not permitted under well-established principles of *res judicata*, known as issue preclusion and claim preclusion.

Constructive Discharge

Both here and in federal court, respondent is claiming that she was the victim of discrimination, harassment and retaliation, improper labor practices by her union, breach of the duty of fair representation, and she is alleging that mistreatment of her by her employer was so bad that she was forced to leave her job.

Respondent's defense of "constructive discharge" is unavailing. This defense derives from a test developed in the federal courts in the context of employment discrimination cases for determining whether an employee's departure was voluntary. "Constructive discharge occurs 'when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. . . .' In

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7 The Department submitted the 2006 OCB decision against respondent, who stated on the record here that she participated in that proceeding (Tr. 33-42). The parties' post-hearing submissions here indicate that both sides appear to have had a full and fair opportunity to litigate Ms. Gertskis' claims before the OCB (ALJ Ex. 7). The OCB dismissed her claims on the merits on April 6, 2006, finding upon review of the record that Ms. Gertskis had failed to state claims against the union for breach of its duty of fair representation or against the City for interfering with her right to file a grievance by altering documents, assertions she had made in federal court and again here (Pet. Ex. 4). Whether an adjudication by OCB as an administrative agency is binding against respondent under principles of collateral estoppel appears to be an open question under New York law. *Harmon v. Matarazzo*, Slip Op., No. 95-CV-3975 (FB), 1997 U.S. Dist. LEXIS 2401 (E.D.N.Y. Feb. 27, 1997), *aff'd*, 162 F.3d 1147 (2d Cir. 1998), *reported in full at* 1998 U.S. App. LEXIS 22351 (2d Cir. Mar. 27, 1998), *cert. denied,* 525 U.S. 1042 (1998). The federal courts in *Gertskis* had the OCB decision before them, *Gertskis*, 2009 U.S. Dist. LEXIS 25244 at *7.

Respondent appeared in that matter *pro se* in the process leading to OCB's judgment on the pleadings, but states, however, that she did have the benefit of legal advice in that matter. The Department indicates that there was no oral argument, but respondent says the opposite (ALJ Ex. 7). I find that it is not necessary for purposes of this Report and Recommendation to determine whether the OCB decision precludes the issues raised by respondent here because the federal court decisions in *Gertskis* are unquestionably dispositive and have full preclusive effect.

order to meet this threshold, 'the trier of fact must be satisfied that the . . . working conditions [were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" *Morris v. Schroder Captial Management Internat'l*, 7 N.Y.3d 616, 621-22 (2006). Here, the same alleged facts which were adjudicated to be without merit in the federal courts -- the supposed victimization of respondent by her supervisors, by the Department's EEO personnel and others in the agency, and by her union -- form the basis of her claim of constructive discharge here (Tr. July 2, 2010 *passim*). The federal courts did not find respondent's workplace intolerable for her; to the contrary, they dismissed for lack of merit her assertions that she was the victim of discrimination and retaliation at work. Respondent's assertions of constructive discharge here are duplicative of and precluded by the prior adjudications against respondent. Thus, respondent has interposed no cognizable defense in this matter to the charge that she was AWOL from her City employment for a three-year period. The record shows that respondent abandoned her job, won an uncontested claim for unemployment benefits, and is currently employed in a different job in the private sector, where respondent states that she feels "perfect" and is "very successful" (Tr. 57-58).

ANALYSIS

In support of the AWOL charge, petitioner presented the affidavit of David Haddow, Director of Administrative Services in the Public Health Laboratory of the Department, sworn to May 3, 2010. Mr. Haddow's affidavit established that respondent has been AWOL as charged from July 9, 2007 to the present (Pet. Ex. 5). It is undisputed that respondent has not reported to work at the Department of Health and Mental Hygiene for more than three years.

Respondent contended at the hearing that she did contact her employer about giving her a different job, but it is undisputed that she never returned to the job at issue here. Her defense is that she was the victim of discrimination and was forced from this job, but the federal courts have rejected the same assertions on the merits. For the same reasons cited above in connection with the denial of respondent's request to relitigate the federal case, and based on law and precedent, including bedrock principles of *res judicata*, I find that respondent has presented no cognizable defense here to her years-long absence from her City job.

Accordingly, I find that respondent engaged in the misconduct with which she is charged.

FINDINGS AND CONCLUSIONS

1. Respondent was properly served with the charge and notice of hearing.
2. Respondent has been absent without authorized leave from July 9, 2007 to the present.

RECOMMENDATION

Respondent has been absent from work without authorization for an extended period of time. She has abandoned her job. Indeed, she has a new job. Respondent's unauthorized absence for three full years is a fundamental form of misconduct that impedes the agency's ability to fulfill its mission. The only appropriate penalty for such misconduct is termination of employment, and I so recommend. Respondent's employment with the City of New York should be terminated forthwith.

Joan R. Salzman Administrative Law Judge
July 30, 2010

SUBMITTED TO: **THOMAS FARLEY, M.D., M.P.H.**
Commissioner
APPEARANCES: **ROSE TESSLER, ESQ.**
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08/16/10

Hon. Thomas Farley, M.D. M.P.H.
Commissioner
Department of Health & Mental Hygiene
125 Worth Street, Suite #331
New York, N.Y. 10013

Re: Dep't of Health & Mental Hygiene v. Gertskis,
OATH Index No.1938/10

PRELIMINARY MATTERS, SETTLEMENT CONFERENCE

I was a permanent Tenured Civil Service Public Employee for 13 years, until on 07/06 I was unofficially terminated from my position of Assistant Chemist and denied the right to a full prior hearing, before penalty of termination was imposed.
I was entitled as a matter of right not of favor to a hearing. No person can be deprived of a right in a manner which contravenes the due process provisions of the Fourteenth Amendment.

In conformity with the Regulations, Procedural Due Process procedure entitles me to a settlement conference, before proceeding to a trial. In order to show that I was provided with it, DOHMH and OATH called 05/04/10 conference a "settlement conference".

On that conference, before going on the record, Judge Spooner advised me that I either have to resign or be terminated after a hearing.
He also advised me that to avoid consequences of being terminated and have a "Bad Record" for future employers, it is in my best interest to resign.
I stated that I have" property" interest in continued employment and will not resign and requested to be transferred. Judge Spooner stated that DOHMH/Union do not have to transfer me, that they do not have such a procedure and I am not entitled for a transfer.

Motion by Respondent to Make Her Own Recording of the On-the Record Proceedings and to Disqualify the Trial Judge and all OATH Judges

My repeated motion to Judge Salzman for my own recording was *in addition* to the On the Record Proceeding, I would like to make my own recording, so I would not loose any part of that "Fair Hearing" was denied for understandable from the previously discussed issues reason- Judge Salzman did not need an accurate recording and had to "work it out" to suit best interest of the petitioners, therefore text and consecutiveness of the events on the hearing was changed. *None of the copies of the certificates* (which I received) *verifying that transcripts are true and accurate are signed*, instead name is printed and signature line distorted.

My " Fair Hearing"transcript from 07/02/10 is distorted in several ways and *some of them* are: some of my words and sentences are changed or cut, so the sentence or a word does not have a meaning.

It is obvious to me, Judge Salzman was following DOHMH/ Union line of defense that I have an issue/problem, therefore she had to show that my complains and statements are "meritless and rambling" and I do not know " Why am I here?" She tried to show that I was *constantly* interrupting and interposing, which was not the case.
My objection to city only wittiness's affidavit was distorted to be incomprehensible.
My objections over the Union absence were made unrecognizable.
Some new exhibits were smuggled after the hearing in to the transcript, which I did not see or heard about on the hearing.
Consecutiveness of the events on the hearing was changed. I have a clear recollection that Ms Tessler request to "go off the record" on page 55 line 10-17 should have been right before the break on page 51, but was placed after the request for the "short break"(it was at least 10-15 minutes), from which judge came at the same time with the petitioners.

My request to disqualify all OATH Judges came from my knowledge of the consequences of this hearing from Judge Spooner statement, that I would be terminated after it.

Evidentiary Rulings

Judge Salzman stated that "Although a conference judge attempted to facilitate a settlement, the parties were unable to settle this matter."
I contend that no one discussed any settlement.
In addition, Judge Salzman stated:" Thus, respondent must do as she is best advised in

connection with any application she may have for City jobs other than the one at issue here."

So the best advise is to resign?

Judge Salzman established undisputed evidence, that I was continuously absent without leave and recommended extreme and unreasonable penalty- to terminate my employment.

I was not disputing fact of my absence. I raised my cross- petition, which she called improper, for my unlawful termination.

Even that it is res-judicata in Judge Salzman opinion, I am entitled to an answer- why I was denied my Constitutionally protected Rights?

The proof of my continuous absence is inadequate to support the determination of quilt.

I never abandoned my job, but requested leave and after changing the reason for leave, I requested a transfer. Since transfer was never afforded- I was illegally removed.

I was willing to work at all times and I insisted upon returning to work in a different location.

Petitioners bear all responsibility for the delay in the holding of hearings in these matters and have to give their reasons for such. They have to explain refusal to process my request to change reason for my unpaid leave of absence, legal bases of DOHMH for refusal to follow their own policies in allowing preliminary relief, refusal of transfer or any remedy after UIA Board Judge decision.

Judge Salzman had to directly examine City only witness and take in to consideration my objection to his affidavit, which is missing essential fact that I requested to change reason for my unpaid leave of absence and asked for the transfer. After deposing city only witness on his omission, she should have allowed me to depose him. Since I am directly effected by her determination, I had to be accorded a fair play and a fair play require an opportunity for presentation of my side of the question.

Cross examination of adverse witnesses is a matter of right in every trial of a disputed issue of fact. That right can be exercised before administrative fact-finding tribunals, and denial thereof by such a tribunal is error of law.

Cross-examination is a fundamental right and not merely a rule of evidence which may be disregarded in administrative hearings.

Impartial judge would have examined Ms. Tessler's reasons on directing H.R. not to communicate with me and to deny me any possibility for the return.

In ***BOARD OF REGENTS OF STATE COLLEGES ET AL. v. ROTH 408 U.S. 564; 92 S. Ct. 2701***

Supreme Court of the United States stated:" To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

I was constitutionally entitled, but was not given any statement of reasons for the decision not to rehire or to reinstate me, nor was I given any meaningful opportunity to defend the charges or challenge the decision at the 07/02/10 "fair hearing".

I was deprived of an interest in "liberty," for in declining to re-employ or transfer me, City imposed on me a stigma that foreclosed my freedom to take advantage of other City employment opportunities. For "to be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . . ." Joint Anti-Fascist Refugee Committee v. McGrath, supra, at 185 (Jackson, J., concurring). See Truax v. Raich, 239 U.S. 33, 41.

ANALYSIS

Mr.D. Haddow affidavit is fraudulent and misleading document which does not establish anything.
Judge Salzman opinion based on this document is unlawful and should be adjudged null and void.
I should be allowed a second chance for the employment with the City in different location.

SUPREME COURT OPINIONS ON THE ISSUES PRESENTED IN MY HEARING

BOARD OF REGENTS OF STATE COLLEGES ET AL. v. ROTH 408 U.S. 564; 92 S. Ct. 2701

MR. JUSTICE MARSHALL
public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely, or whenever the State deprives him of a property **[*588]** interest, I would go further

than the Court does in defining the terms "liberty" and "property."

The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling -- i. e., federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control.

MR. JUSTICE DOUGLAS has written that:

"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." Joint Anti-Fascist Refugee Committee v. McGrath, supra, at 179 (concurring opinion).

And Mr. Justice Frankfurter has said that "the history of American freedom is, in no small measure, the **[*590]** history of procedure." Malinski v. New York, 324 U.S. 401, 414 (1945) (separate opinion). With respect to occupations controlled by the government, one lower court has said that "the public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." Hornsby v. Allen, 326 F.2d 605, 610 (CA5 1964).

Professor Gellhorn put the argument well: "In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice JACKSON in saying: 'Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice' -- blunders which are ***[**2717]*** *likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own. . . ." Summary of Colloquy on Administrative Law, 6 J. Soc. Pub. Teachers of Law 70, 73 (1961).*

I would appreciate that you convey your Final decision in this matter within the next two weeks, so I could contemplate my future actions.

Polina Gertskis

August 16, 2010
Submitted to:
Thomas Farley, M.D., M.P.H.
Commissioner

C: Hon. Joan R.Salzman
Hon. John B. Spooner

NEW YORK PUBLIC PERSONNEL LAW

SUMMARIES OF, AND COMMENTARIES ON, SELECTED COURT AND ADMINISTRATIVE DECISIONS AND RELATED MATTERS AFFECTING PUBLIC EMPLOYERS AND EMPLOYEES IN NEW YORK STATE ISSN 1937-4895

WEDNESDAY, SEPTEMBER 01, 2010

Employee terminated after being found guilty of being AWOL for an extended period of time

Employee terminated after being found guilty of being AWOL for an extended period of time

NYC Department of Health and Mental Hygiene v Gertskis, OATH Index #1938/10

Polina Gertskis, an assistant chemist employed at a public health laboratory operated by the New York City Department of Health and Mental Hygiene was charged with being absent without authorization [AWOL] from her position since July 2007.

Gertskis asked to fourteen witnesses to testify that her employer, her supervisor and her union had discriminated against her on the basis of gender, sex, religion, and national origin.

OATH Administrative Law Judge Joan Salzman denied Gertskis' request, ruling that the issue of alleged unlawful discrimination had already been decided against her in federal district court and thus she could not re-litigate her discrimination in the course of her disciplinary hearing.

ALJ Salzman also determined that Gerskis' claim that she was constructively discharged from her position by the Department was also barred by the federal decisions and thus could not be tried again at her hearing before OATH.
Judge Salzman recommended that Gerskis be terminated for being AWOL.

The decision is posted on the Internet at:
http://archive.citylaw.org/oath/10_Cases/10-1938.pdf

POSTED BY HARVEY RANDALL, ESQ. ON WEDNESDAY, SEPTEMBER 01, 2010
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